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National Association

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In re)	
	)	Case No. 10-63814-fra13
Donald Eugene McCoy, III,)	
	)	DECLARATION OF PILAR C. FRENCH
Debtor.	)	IN SUPPORT OF SUPPLEMENTAL
	)	BRIEFING IN SUPPORT OF MOTION
	)	TO DISMISS COMPLAINT
<hr/> Donald E. McCoy,)	
)	
Plaintiff,)	
)	
vs.)	
)	
BNC Mortgage, Inc., a Delaware corporation,)	
Mortgage Electronic Registration Systems, Inc.,)	
a Delaware corporation, Northwest Trustee	)	Adv. Proc. No. 10-06224-fra
Services, Inc., a Washington corporation, U.S.)	
Bank National Association, as Trustee for the)	
Structured Asset Investment Loan Trust, 2005-)	
10, AIG Federal Savings Bank, Finance)	
America, LLC, Lehman Brothers Holdings,)	
Inc., Impact One Mortgage Services,)	
)	
<hr/> Defendants.)	

I, Pilar C. French, declare and state as follows:

1. I am a member at Lane Powell PC and one of the attorneys for Defendants U.S. Bank, N.A., as Trustee for the Structured Asset Investment Loan Trust, 2005-10 (“U.S. Bank”) and Mortgage Electronic Registration Systems, Inc. (“MERS”) (collectively “Defendants”). I make this declaration based on my own personal knowledge and if called as a witness, I could and would competently testify to the facts stated herein.

2. Attached as **Exhibit 1** is a Memorandum Decision, Findings of Fact and Conclusions of Law and Order Re: Defendants’ Motion to Dismiss and Plaintiff’s Motion to Compel, dated July 2, 2010, issued in *Trotter v. Bank of New York Mellon*, Kootenai County District Court for the State of Idaho, Case No. CV-10-95.

3. Attached as **Exhibit 2** is a Memorandum Decision, Findings of Fact and Conclusions of Law and Order Re: Defendants’ Motion for Summary Judgment, dated November 16, 2010, issued in *Edwards v. Mortgage Electronic Registration Systems, Inc.*, Kootenai County District Court for the State of Idaho, Case No. CV-10-2745.

4. Attached as **Exhibit 3** is an Order, dated September 30, 2010, issued in *In Re Mortgage Electronic Registration Systems (MERS) Litigation*, United States District Court for the District of Arizona, MDL Docket No. 09-2119-JAT.

5. Attached as **Exhibit 4** is a Memorandum Decision and Order granting Motion to Dismiss by defendants and denying Plaintiff’s Motion to Amend Complaint, dated August 27, 2010, issued in *McGinnis v. GMAC Mortgage Corporation, et al.*, United States District Court for the District of Utah (Central Division), Case No. 2:10-cv-00301-TC.

6. Attached as **Exhibit 5** is a Memorandum Decision and Order Granting Motion to Dismiss by Chase Home Finance and Denying Plaintiff’s Motion for Summary Judgment, dated August 16, 2010, issued in *King v. American Mortgage Network*, United States District Court for the District of Utah (Northern Division), Case No. 1:09-CV-125 TS.

7. Attached as **Exhibit 6** is a Memorandum Decision and Order granting Motion to Dismiss by defendants, dated July 13, 2010, issued in *Rodeback v. Utah Financial*, United States District Court for the District of Utah (Northern Division), Case No. 1:09-cv-00134-TC.

8. Attached as **Exhibit 7** is a true and correct copy of MERSCORP, Inc., Terms and Conditions (available at: <http://www.mersinc.org/MersProducts/publications.aspx?mpid=1>).

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 10th day of January 2011, in Portland, Oregon.

/s/ Pilar C. French
Pilar C. French

Levin Sverdlov

Exhibit 1
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successors. *Complaint at p. 3, ¶¶ 7 and 8.* The Deed of Trust was recorded June 24, 2005, as Instrument No. 1959776 in the Kootenai County Recorder's Office.

*Defendants' Memorandum of Law in Support of Motion to Dismiss, Ex A, the Deed of Trust.*¹ The Deed of Trust encumbers a piece of real property located in Kootenai County, Idaho, commonly known as 512 South 14th Street, Coeur d'Alene, Idaho, 83814 (the "Property") and legally described as Lot 13 in Block 11 of Lakeshore Addition to Coeur d'Alene, according to the official plat thereof, filed in Book B of Plats at page(s) 121², official records of Kootenai County, Idaho. This property is Trotter's primary residence. *Complaint at p. 3, ¶ 5.*

Plaintiff's Complaint states that thereafter Countrywide transferred the servicing rights on the loan to BAC Home Loans Servicing, LP, a subsidiary of Bank of America, N.A. *Complaint at p. 4, ¶ 9*³. Defendants argue that servicing has remained with the same entity as BAC Home Loans is the entity formerly known as Countrywide Home Loans, Inc. and that the name change was a result of Bank of America's acquisition of Countrywide. *Defendants' Memorandum of Law in Support of Motion to Dismiss at p. 3 and Ex. B, Countrywide Home Loans, Inc. Company Profile.*

On or about August 18, 2009, MERS executed a Corporation Assignment of Deed of Trust, and recorded the same as Instrument No. 2228916000 in the Kootenai County Recorder's Office on August 24, 2009, the effect of which was to name as the new beneficiary The Bank of New York Mellon f/k/a The Bank of New York ("Bank of New York") as Trustee for the Certificate Holders of CWALT, Inc. Alternative Loan Trust 2005-28CB Mortgage Pass-through Certificates Series 2005-28CB. *Defendants'*

¹ Defendants have not provided page numbers nor labeled their exhibits, as such this Court has had to do so for form and function purposes of this Decision.

² Trotter's Complaint provides page 128, but the Deed of Trust and all other recordings provide page 121.

³ There are two ¶ 9s in the Complaint, this is the first ¶ 9.

*Memorandum of Law in Support of Motion to Dismiss at p. 3 and Ex. C. Corporation
Assignment of Deed of Trust.*

On August 24, 2009, The Bank of New York executed and caused to be recorded on August 24, 2009, in Kootenai County Recorder's Office, an Appointment of Successor Trustee under Instrument No. 2228917000, pursuant to I.C. § 45-1504, naming Recontrust Company, N A. ("Recontrust") the successor trustee under the Deed of Trust. *Defendants' Memorandum of Law in Support of Motion to Dismiss at p.3 and Ex. D, Appointment of Successor Trustee, Complaint at p.4 ¶ 10 and Ex. B.*

Also on August 24, 2009, Recontrust recorded in Kootenai County Recorder's Office, a Notice of Default⁴ as Instrument No. 2228918000, and mailed Trotter the same. The Notice of Default identifies The Bank of New York as beneficiary under the Deed of Trust. *Defendants' Memorandum of Law in Support of Motion to Dismiss at p.4 and Ex. E, Notice of Default, Complaint at p.4 ¶9⁵ and Ex. A.*

On September 2, 2009, Recontrust executed and mailed Trotter the Notice of Trustee's Sale that set a foreclosure sale for January 11, 2010. *Defendants' Memorandum of Law in Support of Motion to Dismiss at p.4 and Ex. F. Notice of Trustee's Sale, Complaint at p.4 ¶ 11 and Ex. C.*

On January 6, 2010, Trotter filed his Complaint for Declaratory and Injunctive Relief and to Cancel Trustee's Sale Scheduled for January 11, 2010, wherein he alleges that he has never been provided with any Assignment demonstrating that the Deed of

⁴ The Notice of Default provides that the default is "[f]ailure to pay the monthly payments due 05/01/2009 of principal, interest and impounds and subsequent installments due thereafter; plus late charges; together with all subsequent sums advanced by beneficiary pursuant to the terms and conditions of said Deed of Trust, and any supplemental modifications thereto. As of 08/18/2009 this amount is \$5,762.88, together with any unpaid and/or accruing real property taxes, and/or assessments, attorney fees, Trustees' fees and costs, and any other amount advanced to protect the security of said Deed of Trust."

⁵ This is the second ¶ 9 of the Complaint.

Trust was transferred by Countrywide to anyone else including Bank of New York. He also alleges that he has no information that informs him of the current owner of the Note. Additionally, Trotter alleges that the securitized loan trust, into which his loan was placed, may have been taken over by borrower default insurance. Consequently, Trotter argues there may not be any default giving rise to a foreclosure action and sale, as his loan obligation may have been liquidated in whole or in part. As such, Trotter argues that the Defendants do not have standing to foreclose or the proper legal or equitable interest in either the Note or Deed of Trust to institute a foreclosure action. *Complaint at pp. 4-6.*

On January 8, 2010, this Court filed its Temporary Restraining Order Cancelling the Trustee's Sale Scheduled for January 11, 2010, finding that "Plaintiff may lose his residence wrongfully without issuance of this temporary restraining order, and that said injury may be irreparable through the scheduled foreclosure sale." *Order at p. 3* On February 5, 2010, this Court entered another Temporary Restraining Order restraining the sale of the property on February 8, 2010.

On February 8, 2010, Defendants filed their Answer, and on April 12, 2010, Defendants filed their Motion to Dismiss for Failure to State a Claim upon which Relief can be Granted, pursuant to IRCP 12(b)(6), and a Memorandum of Law in Support of Motion to Dismiss.

On May 12, 2010, Plaintiff filed his Memorandum of Law in Opposition to Defendants' Motion to Dismiss, along with a Motion to Compel seeking this Court to issue an order compelling the Defendants to fully and completely answer Interrogatories and respond to the Request for Production of Documents dated February 16, 2010. On May 18, 2010, Defendants filed their Response to Plaintiff's Motion to Compel

Production of Documents and their Reply to Plaintiff's Memorandum of Law in
Opposition to Defendants' Motion to Dismiss.

Oral argument was heard on May 26, 2010, and this Court took the matter under advisement. This Memorandum Decision shall constitute this Court's findings of fact and conclusions of law, pursuant to I.R.C.P. 52(a). Any of the following findings of fact that should be denominated as a conclusion of law shall be deemed to be a conclusion of law. Any of the following conclusions of law that should be denominated a finding of fact shall be deemed a conclusion of law.

II. Defendants' Motion to Dismiss

Defendants Bank of New York, MERS, and Recontrust request this Court to dismiss Plaintiff's Complaint pursuant to IRCP 12(b)(6). Defendants also request that this Court take judicial notice of the various public recordings that are attached to their Memorandum of Law in Support of Motion to Dismiss pursuant to I.R.E. 201.

A. Standards

The standard for reviewing a dismissal for failure to state a cause of action pursuant to I.R.C.P. 12(b)(6), is the same as the standard upon the grant of a motion for summary judgment, if the court considers evidence outside the pleadings in ruling on the motion. I.R.C.P. 12(b); *Idaho Sch. For Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 850 P.2d 724 (1993); *Gardner v Hollifield*, 97 Idaho 607, 609, 549 P.2d 266, 268 (1976); *Green v. Gough*, 96 Idaho 927, 928, 539 P.2d 280, 281 (1975). In determining whether a complaint adequately states a cause of action, every reasonable intendment will be made to sustain it. *Curtis v Siebrand Bros. Circus & Carnival Co.*, 68 Idaho 285, 194 P.2d 281 (1948) (citations omitted). A motion under this section admits the truth of the facts alleged, and all intendments and inferences that reasonably may be drawn

therefrom, and such will be considered in light most favorable to the plaintiff. *Walenta v. Mark Means Co.*, 87 Idaho 543, 394 P.2d 329 (1964). A motion to dismiss for failure to state a claim should be granted where it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Gardner v. Hollifield, supra*. The issue is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the claims. *Sumpter v. Holland Realty, Inc.*, 140 Idaho 349, 351 93 P.3d 680, 682 (2004)(citation omitted).

A motion for summary judgment shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. I.R.C.P. 56(c); *Loomis v. City of Hailey*, 119 Idaho 434, 436, 807 P.2d 1272 (1991). Once the moving party has properly supported the motion for summary judgment, the non-moving party must come forward with evidence by way of affidavit or otherwise which contradicts the evidence submitted by the moving party and which establishes the existence of a material issue of disputed fact. *Zehm v. Associated Logging Contractors, Inc.*, 116 Idaho 349, 350, 775 P.2d 1191 (1988). The purpose of summary judgment proceedings is to eliminate the necessity of trial where facts are not in dispute and where existent and undisputed facts lead to a conclusion of law which is certain. *Berg v. Fairman*, 107 Idaho 441, 444, 690 P.2d 896 (1984).

If the court will be the ultimate trier of fact and if there are no disputed evidentiary facts, the judge is not constrained to draw inferences in favor of the party opposing the motion for summary judgment; rather, the trial judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts, despite the possibility of conflicting inferences, because the court alone is responsible for resolving

conflicts between those inferences. *Loomis*, 119 Idaho at 437, 807 P.2d 1272 (1991); *Stafford v. Weaver*, 136 Idaho 223, 225, 31 P.3d 245 (2001) (citation omitted).

B. Discussion

1. Judicial Notice

A court's decision to take judicial notice of an adjudicative fact is a determination that is evidentiary in nature and is governed by the Idaho Rules of Evidence. *Newman v. State*, --- P.3d ---, 2010 WL 323545 (Ct. App., January 29, 2010). I.R.E. 201(b) provides that "a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." A court must take judicial notice if requested by a party and supplied with the necessary information. *Id.*, I.R.E. 201(d).

The exhibits that Defendants have attached to their Memorandum of Law in Support of Motion to Dismiss, as Exhibits A-F (described above), are not subject to reasonable dispute. In fact, Trotter has not disputed their authenticity providing the Court with three of the same records. Further, the Defendants have requested that this Court take judicial notice of the exhibits in writing and this Court does so pursuant to I.R.E. 201(d)

2. Defendants have standing to maintain a foreclosure of the Property.

Trotter argues in his Complaint and Memorandum of Law in Opposition to Defendants' Motion to Dismiss that Bank of New York is not the beneficiary of the Deed of Trust and Recontrust is not the successor trustee and has no standing to bring forth a foreclosure action as against the Property, as MERS was never the beneficiary but merely the nominee.

Trotter provides that "Idaho courts have spoken extensively on the alleged authority of MERS to do anything, and have uniformly, along with other jurisdictions, rejected the authority of MERS to undertake any action to institute or further a foreclosure including any purported assignment of either the Note or the Deed of Trust from the original lender to any third party, which would include Defendant Bank of New York herein." *Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss at pp. 3-4 ¶6.*

Trotter cites this Court to only two Idaho cases; both are cases from the United States Bankruptcy Court for the District of Idaho and are *ne constringo* on this Court.

Defendants argue that MERS was the beneficiary as defined in I.C. § 45-1502 and had the authority to assign its rights to Bank of New York, who then had the right to appoint a successor trustee, Recontrust. Further, Recontrust was vested with the powers of the original trustee, to include the power of sale upon default.

The Idaho Deed of Trust Act, I.C. § 45-1502 et seq. (the "Act"), sets out the guidelines and procedures for carrying out a non-judicial foreclosure proceeding. Beneficiary is defined in I.C. § 45-1502 as "the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or his successor in interest, and who shall not be the trustee." Further, in that statute, Trustee is defined as "a person to whom the legal title to real property is conveyed by trust deed, or his successor in interest."

I.C. § 45-1504(2) provides that:

The trustee may resign at its own election or be replaced by the beneficiary. The trustee shall give prompt written notice of its resignation to the beneficiary. The resignation of the trustee shall become effective upon the recording of the notice of resignation in each county in which the deed of

trust is recorded. If a trustee is not appointed in the deed of trust, or upon the resignation, incapacity, disability, absence, or death of the trustee, or the election of the beneficiary to replace the trustee, the beneficiary shall appoint a trustee or a successor trustee. Upon recording the appointment of a successor trustee in each county in which the deed of trust is recorded, the successor trustee shall be vested with all powers of an original trustee.

This Court finds the following: that MERS was the beneficiary under the Deed of Trust, recorded as Instrument No. 1959776. The Deed of Trust provides “**MERS is the beneficiary under this Security Instrument.**” *See Defendants’ Memorandum of Law in Support of Motion to Dismiss, Exhibit A, at p. 1 (emphasis in original)* Further, Bank of New York is the beneficiary pursuant to the recorded Assignment of Deed of Trust, recorded on August 24, 2009, as Instrument No. 222891600, in which MERS assigned its rights as beneficiary to Bank of New York, pursuant to I.C. § 45-1502(1). Also, as the Beneficiary, Bank of New York was entitled to appoint the successor trustee, in this case Recontrust. Pursuant to I.C. § 45-1504(2), upon recording the Appointment of Successor Trustee in the mortgage records of the county in which the trust deed is recorded, the successor trustee shall be vested with all of the powers of the original trustee. The Appointment of Successor Trustee was recorded in Kootenai County, wherein the Deed of Trust is recorded, on August 24, 2009, as Instrument No. 2228917000. Therefore, as a matter of law, this Court finds that Recontrust was vested with the powers of the original trustee, which includes the power of sale.

Trotter also argues that because the loan was securitized that there may be no default that would give rise to a foreclosure action or sale, and that his loan obligation may have been liquidated. Further, Trotter argues that Defendants have failed to address the matters of credit enhancements, insurances and applicable setoffs to the claimed

amount due as set forth in paragraphs 15 and 16 of the Complaint; thus, there are issues of material fact concerning whether Bank of New York paid 100, 200 or more percent on the loan. This Court finds that Trotter has not cited this Court to any case, statute, contract, or other authority to support the preceding allegations and therefore has not stated a valid cause of action.

Lastly, this Court finds that the Note and Deed of Trust may be sold one or more times without prior notice to the Borrower. Further, the Deed of Trust provides that if the borrower breaches any covenant or agreement contained in the Security Instrument, the Property may be sold. *See Defendants' Memorandum of Law in Support of Motion to Dismiss, Exhibit A at ¶¶20 and 22*

Alternatively, this Court also dismisses Plaintiff's Complaint on the grounds that he has not made any cognizable legal claims. Noticeably absent from Trotter's Complaint is any argument that he is not in default, that he has made a payment and was not credited, that the amount owed is inaccurate or any other cognizable legal claim. Plaintiff has provided this Court with no controlling case law, statute or rule to support his alleged complaints.

3. Idaho's Deed of Trust Act, I.C. § 45-1502, et seq.

Defendants allege that they have complied with the statutory requirements in carrying out the non-judicial foreclosure. Specifically, Defendants allege that they have complied with I.C. §§ 45-1505(1)-(3) and 45-1506.

Trotter does not argue against this allegation, except to state, "whether Defendants allegedly 'complied with' the Idaho foreclosure procedure is irrelevant to the inquiry and issues raised by the Complaint. *Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss at p. 14. ¶ 34.*

In brief, the Act provides that prior to seeking foreclosure, three conditions must be met: (1) the trust deed, all assignments, and the appointment of successor trustee must be recorded in the mortgage records of the county where the property is located; (2) there must be default; and, (3) the trustee or beneficiary must record a notice of default. See I.C. § 45-1505(1)-(3). The Act also provides that following recordation of the Notice of Default, the trustee shall give notice of the trustee's sale by registered or certified mail. See I.C. § 45-1506(2).

The Notice of Trustee's Sale shall set forth: (a) the names of the grantor, trustee and beneficiary in the trust deed; (b) a description of the property covered by the trust deed; (c) the book and page of the mortgage records or the recorder's instrument number where the trust deed is recorded; (d) the default for which the foreclosure is made; (e) the sum owing on the obligation secured by the trust deed; and, (f) the date, time and place of the sale. See I.C. § 45-1506(4)(a)-(f). There is evidence in this record that shows that Defendants have met the requirements of I.C. § 45-1505(1)-(3), 45-1506(2) and 45-1506(4)(a)-(f). Again, Trotter has not opposed, essentially conceding to, Defendants' argument that they have complied with the Act.

III. Plaintiff's Motion to Compel

Plaintiff's Motion to Compel is denied, as it is now moot due to the granting of Defendants' Motion to Dismiss.

IV. Conclusion and Order

Therefore, it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim that would entitle him to relief, and there exist no triable issues of material fact that preclude this Court from granting dismissal. As such, the stays that

were in effect for the January 11th and February 8th, 2010, foreclosure sales are hereby lifted and Defendants' Motion to Dismiss is granted.

It appears to the Court that good cause for the entry of this Order has been shown; now therefore,

IT IS ORDERED, ADJUDGED, AND DECREED that:

Plaintiff's Complaint fails to state a claim upon which relief can be granted as to all causes of action asserted, and there are no genuine issues of material fact existing. For these reasons, this case is dismissed with prejudice. Plaintiff's Motion to Compel is denied, as it is now moot.

IT IS FURTHER ORDERED that the previously entered stays of foreclosure sales (Temporary Restraining Orders) are hereby lifted and vacated.

IT IS FURTHER ORDERED that Defendants will prepare and submit to this Court a judgment consistent with this Memorandum Decision and Order.

DATED this 2 day of July, 2010.

Lansing L. Haynes
LANSING HAYNES, District Judge

CERTIFICATE OF MAILING

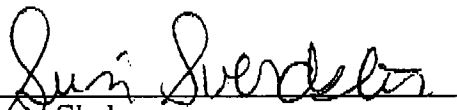
I hereby certify that on the 2 day of July, 2010 a true and correct copy of the foregoing was mailed, postage prepaid, or sent by interoffice mail to:

Monica Flood Brennan
MONICA FLOOD BRENNAN, P.C.
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Lance E. Olsen
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W.J. Barnes, P.A.
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6655 West Sahara Ave., Ste. B200
Las Vegas, Nevada 89146
No fax provided

Daniel English
Clerk of the District Court

By 
Deputy Clerk

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2010 NOV 16 PM 3: 54

CLERK DISTRICT COURT

DEPUTY _____

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

LESLIE JENSEN EDWARDS,)	
	)	CASE NO. CV-10-2745
Plaintiff,)	
	)	MEMORANDUM DECISION, FINDINGS
vs.	)	OF FACT AND CONCLUSIONS OF LAW
	)	AND ORDER RE: DEFENDANTS'
MORTGAGE ELECTRONIC	)	MOTION FOR SUMMARY JUDGMENT
REGISTRATION SYSTEMS, INC., a)	
foreign corporation; QUALITY LOAN)	
SERVICE CORP OF WASHINGTON, a)	
foreign corporation; and PIONEER LENDER)	
TRUSTEE SERVICES LLC, an Idaho)	
limited liability company,)	
)	
Defendants.)	

Monica Flood Brennan, MONICA FLOOD BRENNAN, P.C., for Plaintiff

Jeff Barnes, W.J. BARNES, P.A., for Plaintiff (admitted *pro hac vice*)

Holger Uhl, MCCARTHY & HOLTHUS, LLP, for Defendants

I. Background

On or about May 18, 2005, Plaintiff Leslie Jensen Edwards ("Edwards") executed a Note and Deed of Trust in favor of Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for lender Lehman Brothers Bank, FSB ("Lehman Brothers

Bank”), its assigns and successors. *Amended Complaint at p. 3, ¶¶ 7 and 8.* The Deed of Trust was recorded May 25, 2005, as Instrument No. 1952437 in the Kootenai County Recorder’s Office. *Supplemental Affidavit of Holger Uhl, Exhibit A; Defendants’ Motion to Take Judicial Notice, Exhibit A.*¹ The Deed of Trust encumbers a piece of real property located in Kootenai County, Idaho, commonly known as 17287 West Summerfield Road, Post Falls, Idaho, 83854 (the “Property”) and legally described as set forth on Exhibit A to the Amended Complaint’s Exhibit 3. This property is Edwards’ primary residence. *Amended Complaint at p. 3, ¶ 5.*

In her Amended Complaint for Declaratory and Injunctive Relief, filed June 10, 2010, Plaintiff states that soon after the Note and Deed of Trust were recorded, non-party Aurora Loan Services, LLC, recorded a Substitution of Trustee by which MERS, as nominee for lender Gold Mortgage Corporation, purported to substitute the original trustee, Alliance Title & Escrow Corp., with Fidelity National Title Insurance Company. *Amended Complaint at p. 4, ¶ 9.* Plaintiff alleges that Aurora Loan Services, LLC, is not the original lender and that the Substitution of Trustee is a “fraudulent document, as ‘American Gold Mortgage Corporation’ was never the lender or the beneficiary, and as such, Defendant MERS is a party to the perpetration of a fraud in connection with instituting a fraudulent foreclosure proceeding.” *Amended Complaint at p. 4, ¶¶ 10-12.*

Plaintiff also alleges that on or about December 3, 2009, Defendant Quality Loan Service Corp of Washington (“QLS”) recorded an Appointment of Successor Trustee dated November 30, 2009, whereby MERS, named as beneficiary and nominee for Lehman Brothers Bank, purported to substitute Defendant Pioneer Lender Trustee

¹ This Court notes that Plaintiff has never submitted a copy of the very instrument in question, the Deed of Trust.

Services, LLC, ("Pioneer") as Trustee. Plaintiff alleges that this appointment is a "legal nullity" both because MERS is not and cannot be the beneficiary and because Alliance Title & Escrow Corp. had already been substituted as the Trustee. *Amended Complaint at pp. 4-5, ¶¶ 13 and 14.*

Plaintiff further provides that on or about December 3, 2009, Defendant QLS caused to be recorded a Notice of Election to Sell Under Deed of Trust whereby Pioneer declared its intent to foreclose on the Property. Plaintiff alleges that this Notice is a "fraudulent document, as there was never, at any time, any 'obligations in favor of' Defendant MERS as Defendant MERS was not the originating lender; it did not lend any money; was not owed any money; and did not extend any credit." *Amended Complaint at p. 5, ¶¶ 14 and 15.* Additionally, Plaintiff alleges that Defendants MERS, QLS, and Pioneer are "thus parties to the filing of a fraudulent document in the public records which was filed for the purpose of furthering a fraudulent foreclosure." *Id.*, ¶ 16.

Lastly, Plaintiff alleges that on or about December 7, 2009, Pioneer generated a Notice of Trustee's Sale that claimed that Pioneer was acting as Trustee on behalf of MERS and scheduled the Property for sale. *Id.*, ¶ 17. Also, Plaintiff alleges that, at some point, Lehman Brothers Bank filed for bankruptcy and did not have the authority to divest itself of the loan and therefore all actions relating to the foreclosure are without legal authority and are also fraudulent. *Id. at p. 6, ¶ 18.*

On April 27, 2010, Defendants filed their first Motion to Dismiss. On May 5, 2010, this Court entered its Order to Postpone Foreclosure until after the Court's Ruling on Defendants' Motion to Dismiss, as the parties so stipulated to said postponement. As provided above, Plaintiff filed her Amended Complaint on June 10, 2010, and Defendants filed their Motion to Dismiss the Amended Complaint, pursuant to I.R.C.P.

12(b)(6), 12(b)(7) and 19(a) on July 6, 2010. Defendants, also on that date, filed a Memorandum in Support of their Motion to Dismiss, along with a Motion to Take Judicial Notice of various documents.

On July 20, 2010, Plaintiff filed an Ex Parte Motion to Continue the Motion to Dismiss hearing and to Extend Time to Respond to the Motion to Dismiss, pursuant to I.R.C.P. 56(f). On July 28, 2010, the parties filed a Stipulation to Continue the Motion to Dismiss hearing. On August 6, 2010, Plaintiff filed three documents with this Court: (1) Memorandum in Opposition to the Motion To Dismiss the Amended Complaint; (2) an Affidavit of Leslie Jensen Edwards; and, (3) a Notice of Objection RE: Judicial Notice. On August 9, 2010, Defendants filed a Supplemental Affidavit of Holger Uhl that contains various instruments and documents relating to the non-judicial foreclosure and the Motion to Dismiss.

On August 10, 2010, Defendants filed their Reply Memorandum in Support of their Motion to Dismiss the Amended Complaint. On August 13, 2010, Plaintiff filed a Motion to Strike the Affidavit of Holger Uhl and the Documents Attached Thereto and All Documents filed in Support of the Motion to Dismiss. Further, on that date, Plaintiff filed a Second Motion to Continue the Hearing and Extend Time to Respond to the Motion for Summary Judgment.² On August 19, 2010, Plaintiff filed an Affidavit of Charles Horner. On August 20, 2010, this Court granted Plaintiff's Motion to Continue the hearing, pursuant to I.R.C.P. 56(f).

² All parties have agreed that Defendants' Motion to Dismiss the Amended Complaint is now converted into a Motion for Summary Judgment. Plaintiff agreed to this at oral argument and so provides in her Memorandum in Opposition, and Defendants also agreed to this conversion at oral argument. In any event, matters outside the pleading have been presented to and are not excluded by this Court, in the interests of economy for all and justice. Therefore, this Court will dispose of this matter as a Motion for Summary Judgment.

On September 16, 2010, Plaintiff filed the Second Affidavit of Charles Horner. On September 28, 2010, Defendants filed a Motion to Strike the Affidavits of Charles Horner, along with a Memorandum in Support of the Motion to Strike.

Oral argument was heard on September 30, 2010, and this Court took all matters under advisement. This Memorandum Decision shall constitute this Court's findings of fact and conclusions of law, pursuant to I.R.C.P. 52(a). Any of the following findings of fact that should be denominated as a conclusion of law shall be deemed to be a conclusion of law. Any of the following conclusions of law that should be denominated a finding of fact shall be deemed a finding of fact.

II. Preliminary Matters

A. Plaintiff's Motion to Strike and Objection to Taking Judicial Notice

Edwards has objected to this Court taking judicial notice of the public records that Defendants have requested pursuant to I.R.E. 201. Plaintiff argues that this Court should not consider evidence in ruling on a Motion to Dismiss brought pursuant to I.R.C.P. 12(b)(6). This argument is moot, as this Court and the parties have agreed that Defendants' motion is properly brought as a Motion for Summary Judgment, pursuant to I.R.C.P. 56. Alternatively, this Court does take Judicial Notice of the proffered documents, pursuant to I.R.E. 201, as they are public records of Kootenai County, Idaho, the Idaho Secretary of State, the Federal Reserve Board, and the United States Bankruptcy Court for the Southern District of New York, sources whose accuracy cannot reasonably be questioned. *See I.R.E. 201(b)*. These documents are also provided for in the Affidavit of Holger Uhl, wherein he testifies that the documents are true and correct copies, filed with this Court, and a few of these documents were also submitted by the Plaintiff. Pursuant to I.R.E. 201(c), this Court takes judicial notice of Defendants'

Exhibits A-L, as attached to Defendants' Memorandum in Support of Motion to Dismiss the Amended Complaint and to the Supplemental Affidavit of Holger Uhl.

Edwards also moves this Court for an order striking the Affidavit of Holger Uhl and all documents attached thereto, pursuant to I.R.C.P. 12(f) and I.R.E. 602, 802 and 803. Defendants replied that the documents are properly before this Court as they are true and correct copies of publically recorded documents submitted with an affidavit.

I.R.C.P. 12(f) provides that the Court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. This rule is inapplicable, as the documents submitted to this Court were not attached to a pleading, but to an affidavit submitted in support of a motion for summary judgment. Regardless, the documents are material to the proper determination of this case.

I.R.E. 602 requires that a witness must have personal knowledge of the matter being introduced into evidence. In his affidavit, Mr. Uhl testifies that he has personal knowledge of the statements contained herein. Edwards also seeks to strike the proffered documents by arguing that they are hearsay and that no exceptions apply. I.R.E. 803(6), (8), (14) and (15) all provide an exception to the hearsay rule.

Therefore, Plaintiff's Motion to Strike and Objection to this Court taking judicial notice of Defendants' exhibits are denied.

B. Defendants' Motion to Strike the Affidavits of Charles Horner

Charles Horner has filed two affidavits with this Court, with each one attaching a Mortgage Document Examination & Investigation Report ("Forensic Report") prepared by him and in reference to Edwards' Deed of Trust and Note. Mr. Horner provides a broad review of the various federal laws applicable to a Deed of Trust and limited information applicable to Idaho's Deed of Trust Act.

Defendants argue that the Horner affidavits should be stricken pursuant to I.R.E. 702, as Mr. Horner is not a recognized expert, the Forensic Reports merely provide opinions as to matters of law, and the Reports are irrelevant and therefore violate the best evidence rule. Plaintiff argues that she needs more time to reply to the Motion to Strike.

I.R.E. 702 provides that if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion. Whether a witness is qualified to testify as an expert is largely in the discretion of the trial judge.

This Court recognizes that the matter is one of discretion, and finds that Mr. Horner is an expert witness. Mr. Horner testifies in his affidavit that he is a forensic examiner of mortgage documents and loan materials. Further, he provides that he is a "Member" of the American College of Forensic Examiners Institute. Defendants have not introduced any evidence that Mr. Horner does not possess the knowledge, skill, experience, training, or education to testify on mortgages and home loans.

Further, the opinions provided by Mr. Horner will assist the trier of fact in understanding the evidence, as the evidence in this case is quite unique and difficult to understand, i.e., home loan and foreclosure documents. Therefore, this Court concludes that his testimony is relevant and competent, as to the issues in this particular case.

As such, in this Court's discretion, Mr. Horner is deemed to be an expert witness and his specialized knowledge will assist the trier of fact to understand the evidence in this case. The weight given to the testimony is left to the trier of fact. Therefore, Defendants' Motion to Strike his affidavits is denied.

III. Defendants' Motion for Summary Judgment

The gravamen of Plaintiff's Amended Complaint is her allegation that the Defendants have no legal or equitable rights in the Note or Deed of Trust for purposes of foreclosure, and that said Defendants have no legal standing to institute or maintain foreclosure on the Property. She prays for the Court to issue a declaratory judgment so stating and to permanently bar these Defendants from ever seeking to foreclose on the Property. *Amended Complaint at pp. 10-11, ¶ 38.* In reality, Edwards is asking this Court to order the Lender to modify her loan to create payments that she can afford. Counsel for Edwards stated this much at oral argument and Edwards provides the following in her affidavit:

"On May 18, 2005, I closed on a refinance with Lehman Brothers. I borrowed \$345,000 from them to pay off the loans for the construction [of her home]. We started to make payments of \$2,700 per month including insurance and escrow taxes. The first payment was made to Aurora Loan Services ... [i]n August of 2009, we were unable to make our mortgage payments due to our investments depreciating, loss of employment and loss and loss (sic) of family assistance, which was previously available. In October, 2009, the bank sent us Notice of Missed Payments. We requested a loan modification ... I want to pay my loan at a rate that I can afford. I am still willing to do a loan modification."

Affidavit of Leslie Edwards, filed August 6, 2010.

Defendants have moved this Court for summary judgment, arguing that the Amended Complaint does not provide a colorable claim that prevents them from proceeding with a non-judicial foreclosure under Idaho law. After extensive review of the record and the pertinent law, this Court agrees with the Defendants and **grants** their Motion for Summary Judgment for the reasoning explained below.

A. Standards

Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c); *Bonz v. Sudweeks*, 119 Idaho 539, 541, 808 P.2d 876, 878 (1991). In ruling upon a motion for summary judgment, all disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the nonmoving party. *Bonz*, 119 Idaho at 541, 808 P.2d at 878. The burden of proving the absence of material facts is upon the moving party. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 868, 452 P.2d 362, 365 (1969).

Once the moving party has properly supported the motion for summary judgment with affidavits, admissions or depositions, it is incumbent on the nonmoving party to present opposing evidence through depositions, discovery responses and affidavits sufficient to create a genuine issue for trial. I.R.C.P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Petricevich*, 92 Idaho at 868, 452 P.2d at 365.

To withstand a motion for summary judgment, the nonmoving party's case must consist of more than speculation, it must create a genuine issue regarding a material fact. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991). A mere scintilla of evidence is not enough to create a genuine issue. *Id.* If the evidence presented by the nonmoving party fails to raise a genuine issue for trial, summary judgment shall be entered against that party. I.R.C.P. 56(e).

In considering the evidence presented in support of or opposition to a motion for summary judgment "a court will consider only that material contained in affidavits or depositions which is based upon personal knowledge and which would be admissible at trial." *Petricevich*, at 869, 452 P.2d (1969); I.R.C.P. 56(e). When there is a conflict in the evidence which is presented, a determination should not be made on summary judgment if the credibility can be tested by testimony in court before the trier of fact. *Argyle v. Slemaker*, 107 Idaho 668, 691 P.2d 1283 (Ct.App. 1984).

The purpose of summary judgment proceedings is to eliminate the necessity of trial where facts are not in dispute and where existent and undisputed facts lead to a conclusion of law which is certain. *Berg v. Fairman*, 107 Idaho 441, 444, 690 P.2d 896 (1984).

B. Discussion

1. Defendants have standing to maintain a foreclosure of the Property.

Edwards argues in her Amended Complaint and Memorandum in Opposition to Defendants' Motion to Dismiss that MERS is not the beneficiary of the Deed of Trust, Lehman Brothers Bank is not the Lender, Aurora Loan Services, LLC, is not the Lender and Pioneer is not the Successor Trustee; therefore, none of these parties have standing to bring forth a foreclosure action as against the Property. Edwards cites this Court to several non-Idaho cases and two cases from the United States Bankruptcy Court for the District of Idaho, *In re Sheridan*, Case No. 08-20381-TLM (Bankr. D. Idaho 2009) and *In re Wilhelm*, Case No. 08-20577-TLM (Bankr. D. Idaho 2009). Edwards argues that "[t]he findings by the Court in Sheridan and Wilhelm represent the current state of the law in Idaho as to the lack of authority on the part of MERS." *Plaintiff's Memorandum in Opposition to Motion to Dismiss Amended Complaint at p. 8*.

US Bankruptcy Court decisions do not create binding law in the area of mortgage foreclosure in Idaho, and the cases cited by Edwards are not controlling on this Court. Defendants also cite to several non-Idaho cases that provide that MERS may act as a beneficiary and a nominee. There appears to be a split of opinion on this issue at the federal level that will need to be decided at the federal appellate level, but this Court does not have the authority to create state or federal law. There are no Idaho appellate decisions directly on point to guide this Court and, therefore, this Court relies on Idaho law and the instruments themselves to conclude that MERS is the beneficiary under Edwards' Deed of Trust.

Defendants argue that MERS was the nominee beneficiary as defined in Idaho Code Chapter 15, Title 45, and had the authority to assign its rights to Aurora Bank, FSB, fka Lehman Brothers Bank, who then had the right to appoint a successor trustee, Pioneer. Further, Pioneer was vested with the powers of the original trustee, to include the power of sale upon default.

This Court finds the following facts: The subject property is commonly known as 17287 West Summerfield Road, Post Falls, Idaho, 83854, and legally described as set forth on Exhibit A to the Amended Complaint's Exhibit 3. The Property is located in Kootenai County, Idaho, and does not exceed forty acres.

On or about October 24, 2003, Edwards executed a Deed of Trust and Note with American Gold Mortgage Corporation as Lender, Alliance Title & Escrow Corp., as Trustee and MERS as Nominee for Lender and Beneficiary for the Property. Said Deed

of Trust and Note were recorded in the Kootenai County Recorder's Office on October 29, 2003, as Instrument No. 1839358. *Supplemental Affidavit of Holger Uhl, Exhibit J*³.

On or about June 1, 2005, MERS executed a Substitution of Trustee, wherein MERS as Beneficiary substituted Fidelity National Title Insurance Company as Successor Trustee in place of Alliance Title & Escrow Corp. Said instrument was recorded in the Office of the Kootenai County Recorder's Office on June 21, 2005 as Instrument No. 1958378. *Supplemental Affidavit of Holger Uhl, Exhibit K and Plaintiff's Amended Complaint, Exhibit 1.*

On or about June 8, 2005, Fidelity National Title Insurance Company as Trustee executed a Deed of Reconveyance, as the Deed of Trust with MERS and American Gold Mortgage Corporation "has been paid in full." Said instrument was recorded in the Office of the Kootenai County Recorder's Office on June 21, 2005, as Instrument No. 1958379. *Supplemental Affidavit of Holger Uhl, Exhibit L.*

This occurred as Edwards refinanced her American Gold Mortgage Corporation loan with Lehman Brothers Bank. *Affidavit of Leslie Edwards at p. 2, ¶ 2.*

On or about May 18, 2005, Edwards executed a new Deed of Trust and Note for the Property that provides that Lehman Brothers Bank, FSB, is the Lender, Alliance Title & Escrow as the Trustee and MERS as the Beneficiary and Nominee for the Lender. Said instrument was recorded in the Office of the Kootenai County Recorder's Office on May 25, 2005, as Instrument No. 1952437. *Supplemental Affidavit of Holger Uhl, Exhibit A.* The Deed of Trust provides that "MERS is a separate corporation that is acting solely as nominee for Lender and Lender's successors and assigns. **MERS is the**

³ Citations to the Supplemental Affidavit of Holger Uhl and the attached exhibits are also to the exhibits of which this Court has taken judicial notice.

beneficiary under this Security Instrument" (emphasis in the original). *See Instrument No. 1952437 at p. 2.* Further, in the Deed of Trust, Edwards acknowledges and agrees that "[t]he beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS. *Id. at p. 3.* Additionally, not only did Edwards agree that MERS was designated as the nominee for the Lender and the beneficiary under the Deed of Trust, she also agreed that:

"MERS holds only legal title to the interests granted by Borrower [Edwards] in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of these interests, including but not limited to, the right to foreclose and sell the property; and to take any action required of Lender including, but not limited to, releasing and cancelling this Security Instrument"

Id.

Edwards has admitted that she has not made monthly payments on the loan to any party since July of 2009. *Plaintiff's Response to QLS' First Set of Request for Admission, Production of Documents and Interrogatories Propounded to Plaintiff. See Request for Admission No. 22. See also the Affidavit of Leslie Edwards at p. 2, ¶3.*

On or about November 30, 2009, MERS as Beneficiary and Nominee for Lehman Brothers Bank, FSB, executed an Appointment of Successor Trustee, whereby MERS appointed Pioneer as Trustee and QLS as Attorney in Fact for Pioneer. Said instrument was recorded in the Kootenai County Recorder's Office on December 3, 2009, as Instrument No. 2243744000. *Supplemental Affidavit of Holger Uhl, Exhibit B and Plaintiff's Amended Complaint, Exhibit 2.* QLS is a servicing agent of Pioneer.

On December 3, 2009, Pioneer recorded a Notice of Default and Election to Sell under Deed of Trust with the Kootenai County Recorder's Office, as Instrument No.

2243745000. Said instrument provided that the reason for the default was Edwards "[f]ailure to make the 8/1/09 payment of principal and interest and all subsequent payments, together with late charges, impounds, taxes, advances and assessments." *Supplemental Affidavit of Holger Uhl, Exhibit D and Plaintiff's Amended Complaint, Exhibit 3.*

On or about December 7, 2009, Pioneer provided Edwards with a Notice of Trustee's Sale. Said Notice provided that the Property would be sold by Pioneer as Trustee and on behalf of MERS on April 8, 2010. *Plaintiff's Amended Complaint, Exhibit 4.*

Pioneer and QLS have permission to operate in the State of Idaho, pursuant to the Idaho Secretary of State. *Supplemental Affidavit of Holger Uhl, Exhibits E and H.*

John M. Clark completed a sworn affidavit on December 30, 2009, wherein he testifies that he posted the Notice of Default and/or Notice of Trustee's Sale at the Property on at least three separate occasions, to wit: 12/11/09, 12/19/09, 12/29/09. *Supplemental Affidavit of Holger Uhl, no exhibit number provided.*

Kelli Buley, printer (principal clerk) for the Coeur d'Alene Press, a newspaper providing service to Kootenai County, Idaho, completed an Affidavit of Publication, wherein she testifies that the Notice of Trustee's Sale was published in the Coeur d'Alene Press for four consecutive weeks commencing on December 23, 2009, and ending on January 13, 2010. *Supplemental Affidavit of Holger Uhl, no exhibit number provided.*

On February 10, 2010, Hue Banh of QLS and on behalf of Pioneer recorded an Affidavit of Mailing Notice of Default and Notice of Sale in the Kootenai County Recorder's Office, as Instrument No. 2252982000. Said Affidavit provides that the Notice of Default and Notice of Trustee's Sale were mailed to Edwards at various current

MEMORANDUM DECISION AND ORDER

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and previously known addresses. Additionally, each of the notices were mailed after the Notice of Default and Election to Sell was recorded and at least 120 days before the day fixed in said notice by the Trustee. *Supplemental Affidavit of Holger Uhl, Exhibit C.*

Lehman Brothers Holdings, Inc., filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Southern District of New York on September 15, 2008, case number 08-13555. *Supplemental Affidavit of Holger Uhl, Exhibit I.*

Lehman Brothers Bank, FSB, was renamed Aurora Bank, FSB, ("Aurora")⁴, which is Lender's Successor, on April 27, 2009. *Supplemental Affidavit of Holger Uhl, Exhibit G.* There is no evidence in this record that shows that Lehman Brothers Bank, FSB, has filed for bankruptcy. Further, there is no evidence that Aurora has filed for bankruptcy. Aurora is a federal savings bank and a separate entity than Lehman Brothers Holding, Inc. *Defendants' Memorandum in Support of the Motion to Dismiss at p. 43.*

This Court makes the following conclusions of law: The Idaho Deed of Trust Act, I.C. § 45-1502 et seq. (the "Act"), sets out the guidelines and procedures for carrying out a non-judicial foreclosure proceeding. A beneficiary is defined in I.C. § 45-1502 as "the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or his successor in interest, and who shall not be the trustee." Further, in that statute, a trustee is defined as "a person to whom the legal title to real property is conveyed by trust deed, or his successor in interest."

I.C. § 45-1504(2) provides that:

The trustee may resign at its own election or be replaced by the beneficiary. The trustee shall give prompt written notice of its resignation to the beneficiary. The resignation of the trustee shall become effective upon the recording of the notice of resignation in each county in which the deed of

⁴ Plaintiff appears to have confused Aurora Bank, FSB, with Aurora Loan Services, LLC, a separate entity.

trust is recorded. If a trustee is not appointed in the deed of trust, or upon the resignation, incapacity, disability, absence, or death of the trustee, or the election of the beneficiary to replace the trustee, the beneficiary shall appoint a trustee or a successor trustee. Upon recording the appointment of a successor trustee in each county in which the deed of trust is recorded, the successor trustee shall be vested with all powers of an original trustee.

MERS was the beneficiary and also the nominee for Beneficiary Aurora, fka Lehman Brothers Bank, under the Deed of Trust, recorded as Instrument No. 1952437. The Deed of Trust provides "**MERS is the beneficiary under this Security Instrument.**" Also, as the Beneficiary, MERS was entitled to appoint the successor trustee, in this case Pioneer. Pursuant to I.C. § 45-1504(2), upon recording the Appointment of Successor Trustee in the mortgage records of the county in which the trust deed is recorded, the successor trustee shall be vested with all of the powers of the original trustee. The Appointment of Successor Trustee was recorded in Kootenai County, wherein the Deed of Trust is recorded, on December 3, 2009, as Instrument No. 2243744000. Therefore, as a matter of law, this Court finds that Pioneer was vested with the powers of the original trustee, which includes the power of sale.

Pioneer is an authorized Successor Trustee pursuant to I.C. § 45-1504 and QLS is attorney in fact and an agent authorized to act on behalf of Pioneer, pursuant to Idaho Code Chapter 32, Title 26.

Edwards has alleged that the substitution of trustees and change of lenders is fraudulent. There exist no genuine issues of material fact that any of the Defendants in this case have engaged in fraudulent activity. American Gold Mortgage Corporation and Alliance Title & Escrow Corp. were associated with the previous Deed of Trust that was paid off and refinanced with Aurora.

Edwards also argues that because the loan was securitized there may be no default that would give rise to a foreclosure action or sale, and that her loan obligation may have been liquidated. Further, Edwards argues that Defendants have failed to address the matters of credit enhancements, insurances and applicable setoffs to the claimed amount due; thus, there are issues of material fact concerning whether Aurora was paid 100, 200 or more percent on the loan.

These arguments involve issues relating to federal banking statutes and regulations that this Court cannot address and which would more appropriately be brought in federal court. Edwards has not provided any evidence to support these allegations.

Lastly, this Court concludes that the Note and Deed of Trust may be sold one or more times without prior notice to the Borrower. Further, the Deed of Trust provides that if the borrower breaches any covenant or agreement contained in the Security Instrument, the Property may be sold. There are no genuine issues of material fact that Edwards has breached her agreement with Aurora by not making her monthly payments.

Alternatively, this Court also dismisses Plaintiff's Amended Complaint on the grounds that she has not made any cognizable legal claims. Noticeably absent from Edward's Complaint is any argument that she is not in default, that she has made a payment that was not credited, that the amount owed is inaccurate or any other cognizable legal claim. In fact, Edwards has admitted that she has not made a loan payment in over one year and cannot afford her current loan. Plaintiff has provided this Court with no controlling case law, statute or rule to support her alleged complaints.

2. Idaho's Deed of Trust Act, I.C. § 45-1502, et seq.

Defendants allege that they have complied with the statutory requirements in carrying out the non-judicial foreclosure. Edwards does not argue against this allegation, except to state, "whether Defendants allegedly 'complied with' the Idaho foreclosure procedure is irrelevant to the inquiry and issues raised by the Complaint." *Plaintiff's Memorandum in Opposition to Motion to Dismiss at p. 18*. Mr. Horner provides that Defendants have not complied with I.C. § 45-1505, as Fannie Mae is the current Beneficiary and Aurora Loan Services is merely the servicer. There is no evidence of this in the record. Mr. Horner refers in his affidavit to Exhibit G, but there is no Exhibit G attached to his first affidavit and no exhibits at all attached to his supplemental affidavit. Additionally, Mr. Horner provides that QLS is the Trustee and that I.C. § 45-1504 has not been complied with. As provided above, QLS is the Attorney in Fact and agent for Trustee Pioneer, it is not the Trustee and therefore his argument is incorrect.

In brief, the Act provides that prior to seeking foreclosure, three conditions must be met: (1) the trust deed, all assignments, and the appointment of successor trustee must be recorded in the mortgage records of the county where the property is located; (2) there must be default; and, (3) the trustee or beneficiary must record a notice of default. See I.C. § 45-1505(1)-(3). The Act also provides that following recordation of the Notice of Default, the trustee shall give notice of the trustee's sale by registered or certified mail. See I.C. § 45-1506(2).

The Notice of Trustee's Sale shall set forth: (a) the names of the grantor, trustee and beneficiary in the trust deed; (b) a description of the property covered by the trust deed; (c) the book and page of the mortgage records or the recorder's instrument number where the trust deed is recorded; (d) the default for which the foreclosure is made; (e) the

sum owing on the obligation secured by the trust deed; and, (f) the date, time and place of the sale. *See I.C. § 45-1506(4)(a)-(f)*. There is evidence in this record, and provided for in this Court's findings of fact above, that shows that Defendants have met the requirements of Idaho's Deed of Trust Act.

IV. Conclusion and Order

Therefore, there exist no triable issues of material fact that preclude this Court from granting dismissal of Plaintiff's Amended Complaint. As such, Defendants' Motion for Summary Judgment is granted.

It appears to the Court that good cause for the entry of this Order has been shown; now therefore,

IT IS ORDERED, ADJUDGED, AND DECREED that:

Plaintiff's Complaint fails to state a claim upon which relief can be granted as to all causes of action asserted, and there are no genuine issues of material fact existing. For these reasons, this case is dismissed with prejudice.

IT IS FURTHER ORDERED that the previously entered stay of foreclosure sale is hereby lifted and vacated. Defendants are ordered to comply with the requirements as provided in I.C. § 45-1506A.

IT IS FURTHER ORDERED that Defendants will prepare and submit to this Court a judgment consistent with this Memorandum Decision and Order.

DATED this 11 day of November, 2010.

Lansing L. Haynes
LANSING HAYNES, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 16 day of November, 2010 a true and correct copy of the foregoing was mailed, postage prepaid, or sent by interoffice mail to:

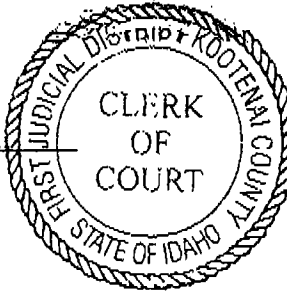
Monica Flood Brennan
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1515 N Federal Highway, STE. 300
Boca Raton, FL 33432
Facsimile: 702-804-8137

Daniel English
Clerk of the District Court

By *Susan Reed*
Deputy Clerk



1 **WO**

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5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 **IN RE Mortgage Electronic Registration)**
10 **Systems (MERS) Litigation**

MDL DOCKET NO. 09-2119-JAT

ORDER

11 **This Order Applies to:**

12 **CV 09-2616-PHX-JAT**
13 **CV 10-78-PHX-JAT**
14 **CV 10-79-PHX-JAT**
15 **CV 10-80-PHX-JAT**
CV 10-81-PHX-JAT
CV 10-630-PHX-JAT

16
17 **In the initial Practice and Procedure Order (Doc. 25), this Court set for the briefing**
18 **schedule for six above-captioned actions transferred by the Panel's initial CTO.**

19 **On August 24, 2010, this Court heard oral argument on sixty-five motions to dismiss**
20 **pertaining to these six member cases. The motions are as follows:**

21 **Motions regarding *Vargas, et al. v. Countrywide Home Loans, et al.*,**

22 **CV 09-2616-PHX-JAT:**

23 **(1) Citimortgage, Inc.'s Motion to Dismiss Plaintiffs' First Amended Complaint and**
24 **Joinder in Certain Other Defendants' Motions to Dismiss (Doc. 262);**

25 **(2) GE Money Bank's Motion to Dismiss Plaintiffs' First Amended Class Action**
26 **Complaint (Doc. 285);**
27
28

1 (3) Motion of Defendants National City Bank, National City Mortgage, National City
2 Corporation and PNC Financial Services Group, Inc. to Dismiss Count Seven of the First
3 Amended Complaint (Doc. 292);

4 (4) Defendant MortgageIT, Inc.'s Motion to Dismiss First Amended Complaint and
5 Joinder in Certain Other Defendants' Motion to Dismiss (Doc. 299);

6 (5) JPMorgan Chase Bank, N.A.'s Motion to Dismiss Plaintiffs' First Amended
7 Complaint [#5 in *Vargas*] and Joinder in Certain Other Defendants' Motions to Dismiss
8 (Doc. 309);

9 (6) Certain Defendants' Motion to Dismiss First Amended Class Action Complaint
10 (Doc. 314);

11 (7) Defendants MERSCORP, Inc. and Mortgage Electronic Registration Systems,
12 Inc.'s Motion to Dismiss Plaintiffs' First Amended Class Action Complaint (Doc. 324).

13 **Motions regarding *Lopez, et al. v. Executive Trustee Services, LLC, et al.*,**

14 **CV 10-78-PHX-JAT:**

15 (8) Citimortgage, Inc.'s Motion to Dismiss Plaintiffs' Second Amended Complaint
16 [#59-1] and Joinder in Certain Other Defendants' Motions to Dismiss (Doc. 260);

17 (9) GE Money Bank's Motion to Dismiss Plaintiffs' Second Amended Class Action
18 Complaint (Doc. 281);

19 (10) Motion of Defendants National City Bank, National City Mortgage, National
20 City Corporation and PNC Financial Services Group, Inc. to Dismiss Counts Five and Six
21 of the Second Amended Complaint (Doc. 291);

22 (11) Motion to Dismiss Second Amended Complaint Against T.D. Service Company
23 (Doc. 297);

24 (12) JPMorgan Chase Bank, N.A.'s Motion to Dismiss Plaintiffs' Second Amended
25 Complaint [#419 in *Lopez*] and Joinder in Certain Other Defendants' Motions to Dismiss
26 (Doc. 308);

27 (13) Certain Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint
28 (Doc. #316);

1 (14) National Default Servicing Corp.'s Motion to Dismiss for Failure to State a
2 Claim for Relief or, in the Alternative for More Definite Statement and/or to Strike Portions
3 of Second Amended Complaint (Doc. 318);

4 (15) Defendants MERSCORP, Inc. and Mortgage Electronic Registration Systems,
5 Inc.'s Motion to Dismiss Plaintiffs' Second Amended Class Action Complaint (Doc. 331).

6 **Motions regarding *Goodwin, et al. v. Executive Trustee Services, LLC, et al.*,**

7 **CV 10-79-PHX-JAT:**

8 (16) Citimortgage, Inc.'s Motion to Dismiss Plaintiffs' Second Amended Complaint
9 [#45-1] and Joinder in Certain Other Defendants' Motions to Dismiss (Doc. 259);

10 (17) Defendant Deutsche Bank National Trust Company's Motion to Dismiss
11 Plaintiffs' Second Amended Class Action Complaint (Doc. 266);

12 (18) Defendant Ocwen Loan Servicing, LLC's Motion to Dismiss Second Amended
13 Complaint (Doc. 268);

14 (19) Defendant Western Progressive Trustee LLC's Motion to Dismiss Second
15 Amended Complaint (Doc. 269);

16 (20) American Home Mortgage Servicing, Inc.'s Motion to Dismiss Plaintiffs' Second
17 Amended Class Action Complaint (Doc. 278);

18 (21) GE Money Bank's Motion to Dismiss Plaintiffs' Second Amended Class Action
19 Complaint (Doc. 282);

20 (22) Defendant Litton Loan Servicing LP's Motion to Dismiss Second Amended Class
21 Action Complaint (Doc. 286);

22 (23) Motion of Defendants National City Bank, National City Mortgage, National
23 City Corporation and PNC Financial Services Group, Inc. to Dismiss Counts Six and Seven
24 of the Second Amended Complaint (Doc. 290);

25 (24) WMC Mortgage Corp.'s Motion to Dismiss Plaintiffs' Second Amended Class
26 Action Complaint (Doc. 296);

27 (25) Motion to Dismiss Second Amended Complaint Against T.D. Service Company
28 (Doc. 298);

1 (26) Motion to Dismiss Second Amended Complaint Against I.B. Property Holdings,
2 L.L.C. (Doc. 300);

3 (27) Aztec Foreclosure Corporation and National Default Servicing Corp.'s Motion
4 to Dismiss for Failure to State a Claim for Relief (Doc. 304);

5 (28) JPMorgan Chase Bank, N.A.'s Motion to Dismiss Plaintiffs' Second Amended
6 Complaint [#443 in *Goodwin*] and Joinder in Certain Other Defendants' Motions to Dismiss
7 (Doc. #305);

8 (29) Bank of New York's Motion to Dismiss (Doc. 310);

9 (30) Certain Defendants' Motion to Dismiss (Doc. 320);

10 (31) Defendants MERSCORP, Inc. and Mortgage Electronic Registration Systems,
11 Inc.'s Motion to Dismiss Plaintiffs' Second Amended Complaint (Doc. 327);

12 (32) Defendant MTC Financial, Inc. dba Trustee Corp's Motion to Dismiss Plaintiffs'
13 Second Amended Class Action Complaint for Failure to State a Claim for Relief, or,
14 Alternatively, Motion for Summary Judgment (Doc. 479).

15 **Motions regarding *Green, et al. v. Countrywide Home Loans, Inc., et al.*,**

16 **CV 10-80-PHX-JAT:**

17 (33) Citimortgage, Inc. and CR Title Services, Inc.'s Motion to Dismiss Plaintiffs'
18 First Amended Complaint [#35] and Joinder in Certain Other Defendants' Motions to
19 Dismiss (Doc. 257);

20 (34) American Home Mortgage Servicing, Inc.'s Motion to Dismiss Plaintiffs' First
21 Amended Class Action Complaint (Doc. 279);

22 (35) GE Money Bank's Motion to Dismiss Plaintiffs' First Amended Class Action
23 Complaint (Doc. 283);

24 (36) Defendant Litton Loan Servicing LP's Motion to Dismiss First Amended Class
25 Action Complaint (Doc. 287);

26 (37) Motion of Defendants National City Bank, National City Mortgage, National
27 City Corporation and PNC Financial Services Group, Inc. to Dismiss Counts Two, Three and
28 Four of the First Amended Complaint (Doc. 294);

1 (38) The Bank of New York Mellon's Motion to Dismiss Plaintiffs' First Amended
2 Complaint [#35] and Joinder In Certain Other Defendants' Motions to Dismiss (Doc. 302);

3 (39) JPMorgan Chase Bank, N.A.'s Motion to Dismiss Plaintiffs' First Amended
4 Complaint [#35] and Joinder in Certain Other Defendants' Motions to Dismiss (Doc. 307);

5 (40) NdeX West, LLC's Motion to Dismiss Plaintiffs' First Amended Class Action
6 Complaint (Doc. 317);

7 (41) National Default Servicing Corp.'s Motion to Dismiss for Failure to State a
8 Claim for Relief, or, in the Alternative for More Definite Statement and/or to Strike Portions
9 of the First Amended Complaint (Doc. 312);

10 (42) Certain Defendants' Motion to Dismiss (Doc. 321);

11 (43) Defendants MERSCORP, Inc. and Mortgage Electronic Registration Systems,
12 Inc.'s Motion to Dismiss Plaintiffs' First Amended Complaint (Doc. 333).

13 **Motions regarding *Dalton, et al. v. Citimortgage, Inc., et al.*,**

14 **CV 10-81-PHX-JAT:**

15 (44) Citimortgage, Inc. and CR Title Services, Inc.'s Motion to Dismiss Plaintiffs'
16 Complaint and Joinder in Certain Other Defendants' Motions to Dismiss (Doc. 258);

17 (45) Defendant Deutsche Bank National Trust Company's Motion to Dismiss
18 Plaintiffs' Class Action Complaint and Joinder in the Motion to Dismiss Filed by Defendant
19 American Home Mortgage Servicing, Inc. (Doc. 267);

20 (46) American Home Mortgage Servicing, Inc.'s Motion to Dismiss Plaintiffs' Class
21 Action Complaint (Doc. 277);

22 (47) GE Money Bank's Motion to Dismiss Plaintiffs' Class Action Complaint (Doc.
23 284);

24 (48) T.D. Service Company's Renewed Motion to Quash Service of Summons and
25 Complaint and Renewed Motion to Dismiss Class Action Complaint (Doc. 293);

26 (49) Motion of Defendants National City Bank, National City Mortgage, National
27 City Corporation and PNC Financial Services Group, Inc. to Dismiss Counts Two, Three and
28 Four of the Complaint (Doc. 295);

1 (50) JPMorgan Chase Bank, N.A., EMC Mortgage Corporation, and California
2 Reconveyance Company's Motion to Dismiss Plaintiffs' Complaint and Joinder in Certain
3 Other Defendants' Motions to Dismiss (Doc. 306);

4 (51) Defendant MetLife Bank, N.A.'s Motion to Dismiss and Joinder in GMAC
5 Mortgage, LLC's Motion to Dismiss and Certain Defendants' Motion to Dismiss Filed By
6 Bank of America, N.A., et al. (Doc. 319);

7 (52) Defendants MERSCORP, Inc. and Mortgage Electronic Registration Systems,
8 Inc.'s Motion to Dismiss Plaintiffs' Class Action Complaint (Doc. 325);

9 (53) Certain Defendants' Motion to Dismiss (Doc. 328);

10 (54) Cal-Western Reconveyance Corporation's Motion to Dismiss Class Action
11 Complaint, or in the Alternative for a More Definite Statement; Motion to Strike Portions of
12 Class Action Complaint (Doc. 423).

13 **Motions regarding *Robinson, et al. v. Citimortgage, Inc., et al.*,**

14 **CV 10-630-PHX-JAT:**

15 (55) Citimortgage, Inc.'s Motion to Dismiss Plaintiffs' First Amended Complaint and
16 Joinder in Certain Other Defendants' Motions to Dismiss (Doc. 261);

17 (56) GE Money Bank's Motion to Dismiss Plaintiffs' First Amended Class Action
18 Complaint (Doc. 280);

19 (57) Motion of Defendants National City Bank, National City Mortgage, National
20 City Corporation and PNC Financial Services Group, Inc. to Dismiss Count Eight of the First
21 Amended Complaint (Doc. 288);

22 (58) JPMorgan Chase Bank, N.A.'s Motion to Dismiss Plaintiffs' First Amended
23 Complaint [#91 in *Robinson*] and Joinder in Certain Other Defendants' Motions to Dismiss
24 (Doc. 303);

25 (59) Certain Defendants' Motion to Dismiss Plaintiff's First Amended Complaint
26 (Doc. 311);

27 (60) Defendants MERSCORP, Inc. and Mortgage Electronic Registration Systems,
28 Inc.'s Motion to Dismiss Plaintiffs' First Amended Complaint (Doc. 326).

Motions addressing multiple cases:

(61) Motion of the Federal Housing Finance Agency as Conservator of Fannie Mae and Freddie Mac to Dismiss (Doc. 264) (Concerning all six);

(62) Motion of Defendants GMAC Mortgage, LLC, Executive Trustee Services, Inc., and Homecomings Financial, LLC to Dismiss All Plaintiffs' Claims Retained by the Court in these Six Cass Actions (Doc. 276) (Concerning all six);

(63) Motion to Dismiss Plaintiffs' Complaints Filed by Defendants Aurora, Old Republic, and Saxon (Doc. 289) (Concerning *Goodwin, Green, and Dalton*);

(64) Motion to Dismiss By Shareholder Defendants (Doc. 315) (Concerning all six);

(65) Motion to Dismiss Plaintiffs' Complaints Filed by Quality Loan Service Corporation (Doc. 343) (Concerning *Goodwin, Green, and Dalton*).

I. BACKGROUND

On April 1, 2009, Plaintiff Alfonso Vargas filed a putative class action. *Vargas, et al. v. Countrywide Home Loans, et al.*, CV 09-2616-PHX-JAT, Doc. 1. On July 27, 2009, a First Amended Class Action Complaint was filed. *Id.*, Doc. 5. In its March 23, 2010 Order, this Court retained jurisdiction over Plaintiffs' Seventh Claim and Eleventh Claim for Relief, which pertain to the formation and operation of MERS. All other claims for relief were remanded to the United States District Court for the Central District of California.

On April 8, 2009, Plaintiff Josefa Lopez filed a putative class action. *See Lopez, et al. v. Executive Trustee Services, LLC, et al.*, CV 10-78-PHX-JAT, Doc. 1. On May 4, 2009, a First Amended Class Action Complaint was filed adding nine plaintiffs. *See id.*, Doc. 35. Plaintiffs filed a Second Amended Complaint on February 3, 2010. Doc. 59.¹ In its March 23, 2010 Order, this Court retained jurisdiction over Plaintiffs' Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Claims for relief, which pertain to the formation and operation

¹ Unless otherwise noted, all docket numbers refer to the docket of *In re Mortgage Electronic Registration Systems*, MDL Docket No. 09-2119-JAT.

1 of MERS. All other claims for relief were remanded to the United States District Court for
2 the District of Nevada.

3 On June 9, 2009, Plaintiff Aleta Goodwin, along with several other plaintiffs, filed a
4 putative class action in the District of Nevada. *Goodwin, et al. v. Executive Trustee Services,*
5 *LLC, et al.*, CV 10-79-PHX-JAT, Doc. 1. On June 24, 2009, a First Amended Class Action
6 Complaint was filed, adding six additional plaintiffs. *See id.*, Doc. 47. On January 8, 2010,
7 Judge Reed of the District of Nevada granted Defendants' Motions to Dismiss (along with
8 other defendants. motions to dismiss) and granted Plaintiffs leave to amend their complaint.
9 *Goodwin v. Executive Trustee Services, LLC*, No. 3:09-CV-306-ECR-PAL, 2010 WL 234786
10 (D. Nev. Jan. 8, 2010), at *9-*10. In particular, Judge Reed dismissed the unjust enrichment
11 claim because Plaintiffs had entered into express, written contracts and thus could not state
12 a claim. *Id.* at *7-*8. Judge Reed noted that he lacked jurisdiction over the claims that were
13 transferred to this Court. *Id.* at *10. On January 29, 2010, Plaintiffs filed the Second
14 Amended Class Action complaint. Doc. 45-1. In an order dated March 23, 2010, this Court
15 retained the Third, Fourth, Sixth, and Seventh Claims for Relief and parts of the Second,
16 Eighth, and Ninth Claims for Relief that relate to the formation or operation of MERS. All
17 other claims for relief were remanded to the United States District Court for the District of
18 Nevada.

19 On July 10, 2009, Plaintiff Joseph Green, along with 30 others, filed a putative class
20 action. *Green, et al. v. Countrywide Home Loans, Inc., et al.*, CV 10-80-PHX-JAT, Doc. 1.
21 On January 8, 2010, Judge Reed of the District of Nevada granted all defendants' motions
22 to dismiss and denied Plaintiffs leave to amend their complaint. *See* Doc. 283-1. In this
23 Court's March 23, 2010 Order, this Court retained jurisdiction over the First, Third and
24 Fourth Claims for Relief and parts of the Second, Fifth, and Sixth Claims for Relief as they
25 relate to the formation and operation of MERS. All other claims for relief were remanded
26 to the United States District Court for the District of Nevada.

27 On September 14, 2009, Plaintiff Lacy J. Dalton, along with over eighty other
28 plaintiffs, filed a putative class action in the District of Nevada. *Dalton, et al. v.*

1 *Citimortgage, Inc., et al.*, CV 10-81-PHX-JAT, Doc 1. In an order dated March 23, 2010,
2 this Court retained claims for relief 1, 3 and 4, retained-in-part claims for relief 2, 5 and 6 to
3 the extent they involved allegations involving the function or operation of MERS. All other
4 claims for relief were remanded to the United States District Court for the District of Nevada.

5 On April 21, 2009, Plaintiffs Jonathan Robinson and Sally Robinson-Burke filed this
6 lawsuit, asserting multiple statutory and common law claims. *Robinson-Burke, et al. v. GE*
7 *Money Bank, et al.*, CV 09-227-TUC-JMR, Doc. 1. On June 19, 2009, Plaintiffs filed the
8 First Amended Class Action Complaint, which added two new plaintiffs. *See id.*, Doc. 91.
9 In an order dated March 23, 2010, this Court retained the Eighth Claim for Relief, and parts
10 of the Tenth and Eleventh Claims for Relief which related to formation and operation of
11 MERS in a separately captioned action, *Robinson, et al. v. GE Money Bank, et al.*, CV 10-
12 630-PHX-JAT. All other claims for relief were remanded to the Honorable Judge John M.
13 Roll of the United States District Court for the District of Arizona.

14 Defendants have now filed the above listed sixty-five motions to dismiss. Nearly all
15 seek to dismiss Plaintiffs' complaints for failure to state a claim under Rule 12(b)(6) and
16 some also advance other theories. As all six class action complaints share nearly identical
17 causes of action, the Court will group similar claims together and address the 12(b)(6)
18 motions pertaining to each set of claims.

19 II. LEGAL STANDARD

20 "A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of a claim." *Navarro*
21 *v. Block*, 250 F.3d 7129, 732 (9th Cir.2001). "To survive a motion to dismiss, a complaint
22 must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is
23 plausible on its face.'" *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atl.*
24 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "The plausibility standard is not akin to a
25 'probability requirement,' but it asks for more than a sheer possibility that a defendant has
26 acted unlawfully." *Iqbal*, 129 S.Ct. at 1949. "Where a complaint pleads facts that are
27 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility
28 and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557).

1 “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need
2 detailed factual allegations, a plaintiff’s obligation to provide the grounds of entitlement to
3 relief requires more than labels and conclusions, and a formulaic recitation of the elements
4 of the cause of action will not do.” *Twombly*, 550 U.S. at 545 (internal quotations, citations
5 and alterations omitted). “Determining whether a complaint states a plausible claim for relief
6 . . . [is] a context-specific task that requires the reviewing court to draw on its judicial
7 experience and common sense. But where the well-pleaded facts do not permit the court to
8 infer more than the mere possibility of misconduct, the complaint has alleged-but it has not
9 ‘show[n]’-‘that the pleader is entitled to relief.’” *Iqbal*, 129 S.Ct. at 1950 (quoting Fed. Rule.
10 Civ. P. 8(a)(2)) (citation omitted).

11 Under Rule 9(b), plaintiffs have an even higher pleading standard in all allegations
12 of fraud, especially in multi-defendant cases such as these. The Ninth Circuit has repeatedly
13 emphasized that “Rule 9(b) does not allow a complaint to merely lump multiple defendants
14 together but require[s] plaintiffs to differentiate their allegations when suing more than one
15 defendant . . . and inform each defendant separately of the allegations surrounding his alleged
16 participation in the fraud.” *Swartz v. KPMG LLP*, 476 F.3d 756, 765 (9th Cir. 2007) (citation
17 omitted); *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008) (“membership
18 in an association does not render an association’s members automatically liable” for a
19 conspiracy); *N. Cal. Pharm. Ass’n v. United States*, 306 F.2d 379, 388-89 (9th Cir. 1962)
20 (trade association membership “does not mean, however, that every member of the
21 Association, by reason of his membership alone, becomes a coconspirator”).

22 **III. WRONGFUL FORECLOSURE**

23 Plaintiffs assert claims for wrongful foreclosure in *Goodwin*, *Lopez*, *Green*, and
24 *Dalton*. Each claim fails to state a claim as a matter of law for at least two reasons.

25 *A. Failure to Allege Lack of Default*

26 First, Nevada law is clear that “[a]n action for the tort of wrongful foreclosure will lie
27 if the trustor or mortgagor can establish at the time the power of sale was exercised or the
28 foreclosure occurred, no breach of condition or failure of performance existed on the

1 mortgagor or trustor's part which would have authorized the foreclosure or exercise of the
2 power of sale." *Ernestburg v. Mortgage Investors Group*, No. 2:08-cv-01304-RCJ-RJJ, 2009
3 WL 160241, at *6 (D. Nev. Jan. 22, 2009) (internal citations and quotations omitted). The
4 plaintiff must establish that they were not "in default when the power of sale was exercised."
5 *Id.* (citing *Collins v. Union Fed. Sav. & Loan Ass'n*, 662 P.2d 610, 623 (Nev. 1983)).
6 Furthermore, a claim for wrongful foreclosure does not arise until the power of sale is
7 exercised. *Collins*, 662 P.2d at 623.

8 *Green* Plaintiffs admit that they have breached their loan obligations:
9 "Borrower/Plaintiffs did not pay the payments agreed in the 'Note' . . ." Doc. 35, ¶ 92. In
10 *Lopez*, Plaintiff Lopez "was unable to continue making payments" and a Notice of Default
11 was recorded. Doc. 59-1, ¶¶ 58, 63. In fact, the *Lopez* Amended Complaint admits that
12 every named plaintiff had been defaulted or was otherwise behind in their payments. Doc.
13 59-1, ¶¶ 71, 79, 88, 99, 109, 118. Similarly, the *Dalton* complaint alleges that at least one
14 plaintiff could "no longer pay the payments" (see 10-81-PHX-JAT, Doc. 2, ¶ 138 (a)) and
15 does not make any allegation that any plaintiff made the payments agreed upon under the
16 terms of their loans. The *Goodwin* Second Amended Complaint alleges that at least one
17 plaintiff "ceased making payments" (see Doc. 54-4, ¶ 134 (b)) and does not make any
18 allegation that any plaintiff made the payments agreed upon under the terms of their loans.
19 By failing to plead that their loans are not in default, all of Plaintiffs' claims for wrongful
20 foreclosure are barred as a matter of law and will be dismissed for failure to state a claim.
21 Further, for many of the claims in these actions, Plaintiffs do not allege that the power of sale
22 has been exercised. For these plaintiffs, these claims for wrongful foreclosure are premature
23 and not actionable.

24 *B. MERS and MERS-appointed trustees have power to foreclose*

25 Even if Plaintiffs' claims for wrongful foreclosure were not barred by their failure to
26 plead absence of default, Plaintiffs' claims suffer other deficiencies. Plaintiffs have failed
27 to allege facts upon which the Court could draw the reasonable inference that the foreclosure
28 trustees were not properly appointed and thus lacked the power to exercise the power of sale.

1 Plaintiffs' "split the note" theory has been recognized by several courts in are particular
2 context and to a limited extent. MERS has been found to be less than a traditional
3 beneficiary in that it holds the deed of trust, but not the accompanying mortgage note and the
4 payments made on account of such loans. *See In re Hawkins*, No. BK-S-07-13593-LBR,
5 2009 WL 901766 (Bankr. D. Nev. Mar. 31, 2009). This splitting of the note from the deed
6 of trust does affect the parties' legal rights and thus, when MERS or a participant in the
7 MERS system has needed a Court to grant affirmative relief—for example, when it needs
8 relief from an automatic stay in a bankruptcy court—Courts have not granted that relief. *See*
9 *In re Hawkins* (denying relief from automatic state in bankruptcy proceedings); *In re Vargas*,
10 396 B.R. 511, 517 (Bankr. C.D. Cal. 2008) (same); *Bellistri v. Ocwen Loan Servicing, L.L.C.*,
11 284 S.W.3d 619 (Mo. Ct. App. 2009) (denying relief to a foreclosure trustee appointed by
12 MERS for lack of "interest" in the property).

13 However, the situation in the cases before the Court differ in one important respect:
14 they concern non-judicial foreclosures under Nevada law. "Defendants do not need to
15 produce the note to the property in order to proceed with a non-judicial foreclosure." *Urbina*
16 *v. Homeview Lending Inc.*, 681 F. Supp. 2d 1254 (D. Nev. 2009) (dismissing Plaintiffs'
17 allegations that Defendants did not possess the original note); *see also Mansour v.*
18 *Cal-Western Reconveyance Corp.*, 618 F.Supp.2d 1178, 1181 (D. Ariz. 2009) (rejecting
19 similar "show me the note" argument under Arizona's non-judicial foreclosure law and
20 collecting cases with similar holdings).

21 Plaintiffs further argue that when "the note is split from the deed of trust, then the note
22 becomes unsecured and a person holding only the note lacks the power to foreclose and a
23 person holding only a deed of trust suffers no default because only the holder of the note is
24 entitled to payment on it." *See, e.g., Dalton* Complaint, CV 10-81-PHX-JAT, Doc. 3 at 18.
25 Plaintiffs, however, fail to allege any facts in their amended complaint that would support
26 such a theory. Indeed, the deeds of trust state that MERS will serve as the nominee for the
27 original lender as well as the original lender's successors and assigns. *See, e.g., the Casas-*
28 *Martinez Deed of Trust*, Doc. 352 at 25. Thus, from the very language of the deeds of trust,

1 to which Plaintiffs agreed in entering into their home loan transaction, MERS is still acting
2 as the nominee for the current holder of the promissory note. Plaintiffs have failed to allege
3 any facts suggesting that MERS is not the nominee of the current owner of the promissory
4 note; nor do Plaintiffs allege any facts supporting their assertion that the promissory note and
5 the deed of trust have been bifurcated. Plaintiffs have not cited any legal authority where the
6 naming of MERS—and the consequent “splitting of the note”—was cause to enjoin a
7 non-judicial foreclosure as wrongful. Indeed Nevada case law universally holds that these
8 deeds are enforceable. *See Orzoff v. MERS*, No. 2:08-cv-01512, 2009 WL 4643229, at *6
9 (D. Nev. Mar. 26, 2009) (“Plaintiff has cited no authority that is controlling upon this Court
10 that holds MERS cannot have standing as a nominee beneficiary in connection with a
11 nonjudicial foreclosure proceeding under Nevada law. This Court has previously determined
12 that MERS does have such standing.”); *Vazquez v. Aurora Loan Servs.*, No 2:08-cv-01800,
13 slip op. at 2 (D. Nev. Mar. 30, 2009) (loan documents sufficiently demonstrated standing by
14 Defendants, including MERS, “with respect to the loan and the foreclosure”); *Gonzalez v.*
15 *Home American Mortgage Corp.*, Case No. 2:09-cv-00244, slip op. at 7-9 (D. Nev. Mar. 12,
16 2009) (MERS and successor trustee have the power to initiate non-judicial foreclosure
17 without presenting the note); *Ramos v. MERS, Inc.*, Case No. 2:08-cv-1089-ECR-RJJ, 2009
18 WL 5651132, at *3 (D. Nev. Mar. 5, 2009) (“under the deed of trust, MERS was empowered
19 to foreclose on the property and to appoint [a] substitute trustee for purpose of conducting
20 the foreclosure”). Therefore, for this additional reason, Plaintiffs’ claims for wrongful
21 foreclosure fail to state a claim.

22 In sum, Plaintiffs’ actions for wrongful foreclosure are all dismissed for failure to state
23 a claim.

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III. CONSPIRACY TO COMMIT WRONGFUL FORECLOSURE

A. Lack of Underlying Claim

Plaintiffs also assert claims for conspiracy to commit wrongful foreclosure in *Goodwin, Lopez, Green, and Dalton*.² Since Plaintiffs fail to state a claim for wrongful foreclosure, their claims for conspiracy to commit wrongful foreclosure also must fail. It is well settled that a plaintiff cannot prevail on a claim for conspiracy if the underlying claim is defective. *Grisham v. Philip Morris USA*, 403 F.3d 631, 635 (9th Cir. 2000) (claim for civil conspiracy fails if underlying cause of action fails). “Civil conspiracy is not an independent cause of action—it must arise from some underlying wrong.” *Paul Steelman Ltd. v. HKS, Inc.*, No. 2:05-cv-01330-BES-RJJ, 2007 WL 295610, at *3 (D. Nev. Jan. 26, 2007) (“having concluded that Plaintiffs’ claim of tortious interference is not actionable as pleaded, Steelman’s civil conspiracy claim must also fail”) (citing *Sahara Gaming Corp. v. Culinary Workers Union Local 226*, 984 P.2d 164, 165 (Nev. 1999)). Accordingly, because plaintiffs have not and cannot present a valid claim for wrongful foreclosure, these claims are dismissed as a matter of law.

B. Failure to Allege Specific Facts to Support Inference of a Conspiracy

Regardless of the merits of Plaintiffs’ underlying claims for fraud, Plaintiffs’ claim that Defendants conspired to commit wrongful foreclosure is insufficient both for a failure to plead conspiracy with the requisite particularity and for a failure to plead an agreement to participate in the wrongful foreclosure.

For a conspiracy-to-defraud action to lie under Nevada law, a plaintiff must plead and prove that there is: “(1) a conspiracy agreement . . . ; (2) an overt act of fraud in furtherance of the conspiracy; and (3) resulting damages to the plaintiff.” *Jordan v. State ex rel. Dept. of Motor Vehicles and Pub. Safety*, 110 P.3d 30, 51 (Nev. 2005). “To prevail in a civil

² The claims in *Green* and *Dalton* are titled: “Conspiracy to Commit Wrongful Foreclosure by Creation, Operation and Use of the MERS System.” The claims in *Goodwin* and *Lopez* are titled: “Conspiracy to Commit Wrongful Foreclosure Related to the MERS System.”

1 conspiracy action, a plaintiff must prove an agreement between the tortfeasors, whether
2 explicit or tacit.” *GES, Inc. v. Corbitt*, 21 P.3d 11, 15 (Nev. 2001). Thus, to maintain a
3 viable conspiracy claim a plaintiff must allege with sufficient factual particularity the
4 “specific time, place, or person involved in the alleged conspiracies to give a defendant
5 seeking to respond to allegations of a conspiracy an idea of where to begin.” *Kendall v. Visa*
6 *U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008) (quotations and citation omitted). Put
7 another way, plaintiffs must plead the “who, what, when, where and how of the misconduct
8 charged” necessary to satisfy the requirements of Federal Rule of Civil Procedure 9(b). *See*
9 *Gowen v. Tiltware LLC*, No. 2:08-CV-1581, 2009 WL 1441653, at *9 (D. Nev. May 19,
10 2009) (quoting *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003)).
11 Specifically, “a plaintiff must allege with sufficient factual particularity that defendants
12 reached some explicit or tacit understanding or agreement. It is not enough to show that
13 defendants might have had a common goal unless there is a factually specific allegation that
14 they directed themselves towards this wrongful goal by virtue of a mutual understanding or
15 agreement.” *S. Union Co. v. Sw. Gas Corp.*, 165 F.Supp.2d 1010, 1020-21 (D. Ariz. 2001)
16 (quoting *Alfus v. Pyramid Technology Corp.*, 745 F.Supp. 1511, 1521 (N.D. Cal. 1990)).

17 Plaintiffs allege that Defendants: (1) formed an association to conspire in order to
18 deprive Plaintiffs of their property; (2) knew Plaintiffs would be unable to pay the loans and,
19 thus, Defendants would be in a position to seize Plaintiffs’ real property through foreclosure;
20 and (3) targeted Plaintiffs for the purpose of misrepresenting the terms of the loans in order
21 to seize Plaintiffs’ properties. However, Plaintiffs do not plead any of these allegations with
22 sufficient factual allegations. Plaintiffs have failed to plead how or even when Defendants
23 formed this purported association to conspire. Neither have Plaintiffs included any factual
24 allegations pertaining to how Defendants targeted Plaintiffs. Plaintiffs’ allegations amount
25 to a claim that Defendants *somehow* formed a conspiracy with the intent to provide Plaintiffs
26 with a loan, the terms of which they could not afford, thus permitting Defendants to gain
27 control of the properties through foreclosure. “But terms like ‘conspiracy,’ or even
28 ‘agreement,’ are border-line: they might well be sufficient in conjunction with a more

1 specific allegation—for example, identifying a written agreement or even a basis for inferring
2 a tacit agreement—but a court is not required to accept such terms as a sufficient basis for a
3 complaint. The case law on this point is ample.” *DM Research, Inc. v. Coll. of Am.*
4 *Pathologists*, 170 F.3d 53, 56 (1st Cir. 1999) (cited with approval in *Twombly*, 550 U.S. at
5 557). Plaintiffs have failed to provide any specific, factual allegations inferring even a tacit
6 agreement. As such, Plaintiffs’ claims for conspiracy fall short of the requirements of Rule
7 9(b), *Twombly*, and *Iqbal*.

8 Plaintiffs’ claim for conspiracy to commit wrongful foreclosure fails both because
9 Plaintiffs have not stated a claim for the underlying tort—wrongful foreclosure—and because
10 Plaintiffs fail to state the basic elements of conspiracy. Thus, the Court will grant the
11 motions to dismiss these claims.

12 **IV. CONSPIRACY TO COMMIT FRAUD RELATED TO THE MERS SYSTEM**

13 In all six actions, Plaintiffs attempt to state a claim for Conspiracy to Commit Fraud
14 Related to the MERS® System.³ In these claims, Plaintiffs assert that various named
15 Defendants conspired to commit fraud through the MERS system. From the complaints,
16 Plaintiffs’ claims for conspiracy to commit fraud appears to be an attack on the legitimacy
17 of the MERS system itself. A nearly identical claim for Conspiracy to Commit Fraud
18 Related to the MERS® System was dismissed with prejudice by this Court in *Cervantes v.*
19 *Countrywide Home Loans*, CV 09-517-PHX-JAT, 2009 WL 3157160 (D. Ariz. Sep. 24,
20 2009), because no facts were alleged showing any fraud was committed by MERS or in the
21 MERS system. In an effort to distinguish the present cases from *Cervantes*, Plaintiffs, in
22 their responses, argue that they “have not alleged that the MERS system is fraudulent, and
23 Plaintiffs have not alleged that MERS committed any fraud” (Doc. 448 at 4). Instead,
24 Plaintiffs now maintain that these claims:

25 “are about how the defendants named as co-conspirators created and used the
26 MERS system to facilitate the securitization and sale of loans procured by

27 ³ The Claims in *Green* and *Dalton* are titled: “Conspiracy to Commit Fraud by
28 Creation, Operation and Use of the MERS System.”

1 fraud (also known as predatory loans, subprime loans, and toxic loans), and
2 how the defendants created and used the MERS system to facilitate wrongful
3 foreclosures on the parties who were the victims of predatory lending, and how
the MERS system was used to facilitate wrongful foreclosures on others in
Nevada”

4 *Id.* Under both Plaintiffs’ complaints and the gloss provided by Plaintiffs’ Responses,
5 Plaintiffs fail to state a claim. For the sake of thoroughness, the Court will consider each of
6 these constructions—that the MERS system is itself fraudulent or that the MERS system
7 “facilitated” fraudulent activity in turn.

8 *A. The MERS system is not fraudulent, and MERS has not committed any fraud*

9 While Plaintiffs have conceded this point, it is helpful to provide an overview of the
10 facts. MERS is a wholly owned subsidiary of MERSCORP, a Virginia corporation. Various
11 of the named Defendant banks and lending institutions are shareholders in MERSCORP and
12 participants in the MERS system. Under the MERS system, at the origination of a residential
13 loan, the lender takes possession of a promissory note and the borrower and lender agree to
14 designate MERS as the beneficiary under a deed of trust. Under the MERS system, the rights
15 to the mortgage are tracked internally and not recorded in the public records each time the
16 rights to the mortgage are bought and sold, so long as the buyer is a member of the MERS
17 system.

18 This Court in *Cervantes* considered two possible ways in which this MERS system
19 could be considered fraudulent: (1) MERS is never really a beneficiary under the deed of
20 trust because it never acquires a true beneficial interest; and (2) the MERS system is a means
21 of circumventing the public recording requirements. The Court found that Plaintiffs’ claims
22 for conspiracy to commit fraud fail as a matter of law under Rule 12(b)(6) in that it failed to
23 assert several elements of a claim for fraud. The Court relies on the analysis put forward in
24 *Cervantes*. The elements of a fraud claim under California and Nevada law are largely
25 similar to the elements of fraud under Arizona law.⁴ Here, under both theories considered
26

27 ⁴ In Arizona, a fraud claim requires proof of nine elements: (1) a representation; (2)
28 its falsity; (3) its materiality; (4) the speaker’s knowledge of its falsity or ignorance of its

1 in *Cervantes*, several elements of a fraud claim under Arizona, California, or Nevada
 2 law—falsity, reliance, and injury—are lacking from Plaintiffs’ complaints. Thus, Plaintiffs
 3 have now reframed the issue as a question of whether MERS facilitates origination fraud, a
 4 question to which the Court now turns.

5 *B. MERS “facilitated” fraudulent practices*

6 1. Failure to Plead the Underlying Claim

7 Plaintiffs have, in their responses, advanced a new gloss on their conspiracy to commit
 8 fraud claims. They maintain that fraudulent inducement is the “underlying act[] on which
 9 the conspiracy claim[] is based.” (Doc. 448 at 8 n. 17.) The complaints in *Goodwin*, *Lopez*,
 10 and *Vargas* contain such allegations of fraudulent inducement, but nothing in the *Dalton*,
 11 *Green* and *Robinson* complaints makes this type of allegation. Plaintiffs admit this
 12 deficiency in their responses. *See id.* at 20 n. 51 (Admitting that while “Plaintiffs in *Dalton*
 13 and *Green* and *Robinson* are also able to make similar allegations,” the current complaints
 14 do not contain these allegations.). Thus, absent allegations of the underlying fraud, the
 15 *Dalton*, *Green*, and *Robinson* Complaints do not—and cannot as a matter of law—state a claim
 16 for Conspiracy to Commit Fraud Related to the MERS® System. *Rashidi v. Albright*, 818
 17 F. Supp. 1354, 1360 (D.Nev. 1993) (holding that because the underlying claim failed the
 18 conspiracy claim must also be dismissed); *see also Willis v. City of L.A.*, 57 F. App’x 283,

19
 20 truth; (5) the speaker’s intent that it be acted upon by the recipient in a manner reasonably
 21 contemplated; (6) the hearer’s ignorance of the falsity of the representation; (7) the hearer’s
 22 reliance on the truth of the representation; (8) the right to rely on it; and (9) consequent and
 proximate injury. *Echols v. Beauty Built Homes, Inc.*, 647 P.2d 629, 631 (1982).

23 In Nevada, to state a claim for fraud in the inducement, a plaintiff must allege (1) a
 24 false representation of material fact made by the defendant; (2) defendant’s knowledge or
 25 belief that the representation is false; (3) defendant’s intention to induce the plaintiff to act
 or to refrain from acting in reliance upon the misrepresentation; (4) plaintiff’s justifiable
 reliance upon the misrepresentation; and (5) damage to the plaintiff resulting from such
 reliance. *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1260-61 (1998).

26 In California, to state a claim for fraud, a party must allege (1) a misrepresentation,
 27 (2) scienter or knowledge of falsity, (3) an intention to defraud, (4) justifiable reliance, and
 28 (5) damages to state a claim for fraud. *Dias v. Nationwide Life Ins.*, No. 09-cv-524, 2010
 WL 1032777, at *8 (E.D. Cal. Mar. 19, 2010).

1 287 (9th Cir. 2002) (where no tort alleged, defendants not liable for civil conspiracy as a
2 matter of law).

3 As for the *Goodwin*, *Lopez*, and *Vargas* complaints' allegations of fraudulent
4 inducement, those claims have been remanded to the transferor courts. Yet, because the
5 claim for Conspiracy to Commit Fraud must necessarily fail without an underlying tort, the
6 undersigned must consider the validity of the Fraud in the Inducement Claims. Helpfully, two
7 transferor courts have already addressed these claims and dismissed them under Rule
8 12(b)(6) for failure to state a claim. *See Goodwin v. Executive Trustee Services, LLC*, 680
9 F.Supp.2d 1244, 1256 (D. Nev. 2010) (dismissing fraud in the inducement claim, finding
10 "Plaintiffs' claim for fraud in the inducement fails to allege who made what
11 misrepresentations or when any of the alleged misrepresentations took place. The claim is
12 replete with vague and conclusory allegations such as 'Defendants misrepresented the ability
13 of Plaintiffs, and other similarly situated, to qualify for the loans.'"); *Lopez, et al., v.*
14 *Executive Trustee Services, LLC, et al.*, No. 3:09-CV-0180-ECR (D. Nev. Jan. 13, 2010)
15 Order at 17 (same). The Court finds that just as in *Goodwin* and *Lopez*, the *Vargas* Plaintiffs
16 fail to plead any of the requisite elements of a claim for fraud in the inducement with the
17 specificity required by Fed. R. Civ. P. 9(b).⁵

18 2. Insufficient allegation of conspiracy

19 Regardless of the merits of Plaintiffs' underlying claims for fraud, Plaintiffs' claim
20 that Defendants conspired to commit fraud related to MERS is insufficient both for a failure

21
22 ⁵ Defendant GE Money Bank also raised the possibility that Plaintiffs' state law
23 claims for conspiracy to commit fraud against GE Money Bank are preempted by the Federal
24 Home Owners' Loan Act of 1933 (HOLA) and Office of Thrift Supervision regulations
25 promulgated thereunder. *See* 12 U.S.C. §§ 1461, *et seq.*; 12 C.F.R. § 560.2. However, GE
26 Money Bank provides no evidence (i.e., through a request for judicial notice) beyond mere
27 assertion that it is a thrift or savings association that would be governed by HOLA and
28 protected by the OTS regulations on preemption. Furthermore, the Court is not convinced
that HOLA preempts this type of fraud claim. *See Reyes v. Downey Savings & Loan Ass'n,*
F.A., 541 F. Supp. 2d 1108, 1114 (C.D. Cal. 2008) (finding state law claims that defendants
had misrepresented the contract terms were based on the "principles of breach of contract and
fraud in the inducement [that] are not specific to lending activities" and thus not preempted).

1 to plead conspiracy with the requisite particularity and for a failure to plead an agreement to
2 participate in the fraud. "In alleging fraud or mistake, a party must state with particularity
3 the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Plaintiffs' allegations
4 with respect to fraud were not made with particularity. Rather, Plaintiffs' allegations amount
5 to mere conclusory statements and general averments of fraud. As set forth above section
6 III.B above, Plaintiffs' complaints fall short of the requirements of Rule 9(b), *Twombly*, and
7 *Iqbal*.

8 Thus, due both a lack of an underlying fraud and insufficient allegations of
9 conspiracy, the facilitation gloss advanced by Plaintiffs in their responses fails to save their
10 claims for conspiracy to commit fraud. The Court will dismiss these claims for failure to
11 state a claim.

12 SLANDER OF TITLE

13 Plaintiffs assert claims for slander of title in *Goodwin* and *Lopez*. A claim for slander
14 of title requires "false and malicious communications, disparaging to one's title in land, and
15 causing special damages." *Executive Mgmt., Ltd. v. Ticor Title Co.*, 963 P.2d 465, 478 (Nev.
16 1998).

17 Plaintiffs bring claims for slander of title in *Goodwin* on the allegation that certain
18 defendants "caused to be recorded a Trustee's Deed Upon Sale related to the . . . residence
19 showing that the property" had been conveyed at a trustee's sale (Doc. 45-1, ¶¶ 170-190) and
20 claims for slander of title in *Lopez* on the allegation that certain defendants wrongfully
21 recorded notices of default and intent to foreclose against Plaintiffs' property (Doc. 59-1, ¶¶
22 154-170). Here, Plaintiffs have not sufficiently alleged the falsity of these communications.
23 Just as in *Ramos v. Mortgage Electronic Registrations [sic] Systems, Inc.*, No.
24 2:08-cv-1089-ECR-RJJ, 2009 WL 5651132, at *4 (D. Nev. Mar. 5, 2009), "Plaintiffs do not
25 dispute that they were in default on their loan. Nor is it false that the property was to be sold
26 at a trustee's sale. . . . It is not clear, therefore, what Plaintiffs might assert to be false or
27 malicious about the recorded notice." In *Goodwin*, there is no allegation that the trustee's
28 sale had not taken place and the property had been conveyed, and in *Lopez*, there is no

1 allegation that Plaintiffs were not in default or that a trustee's sale was actually not
2 scheduled. The only alleged falsity emerges from Plaintiffs' argument that the MERS
3 recordation process splits the note from the deed of trust, renders the note unenforceable, and
4 thus all subsequent action—including these recordations—are invalid and false. As dealt with
5 elsewhere in this Order, this argument is not supported by the law. Therefore, the Court will
6 dismiss Plaintiffs' claims for slander of title for failure to state a claim.

7 UNJUST ENRICHMENT

8 Plaintiffs set forth claims for unjust enrichment in *Goodwin, Lopez, Dalton, Green* and
9 *Vargas*. To set forth a claim for unjust enrichment under Nevada law, a plaintiff must allege
10 that a defendant unjustly retained money or property of another against fundamental
11 principles of equity. *See Asphalt Prods. Corp. v. All Star Ready Mix*, 898 P.2d 699, 700
12 (Nev. 1995). California law is similar. *See, e.g., Shum v. Intel Corp.*, 630 F. Supp.2d 1063,
13 1073 (N.D. Cal. 2009) (stating elements for unjust enrichment are receipt of a benefit and
14 unjust retention of same at the expense of another). Unjust enrichment must be premised on
15 some independent basis which establishes a duty on the part of the defendant and the failure
16 of the defendant to abide by that duty. In and of itself, the phrase "unjust enrichment" does
17 not describe a theory of recovery. Rather, it is a way of describing the failure to make
18 restitution where equity requires. *See Melchior v. New Line Prods., Inc.*, 106 Cal.App. 4th
19 779, 792, (Cal. Ct. App. 2003);

20 Here, the Court finds that Plaintiffs have failed to state any other claims for relief.
21 Thus, as a matter of law, Defendants cannot have been unjustly enriched and equity does not
22 demand any restitution. Therefore, the Court will also dismiss the claims for unjust
23 enrichment for failure to state a claim.

24 DECLARATORY AND INJUNCTIVE RELIEF

25 Plaintiffs also seek injunctive and declaratory relief. However, for the various reasons
26 discussed above, the Court has already found that all of Plaintiffs' other claims before this
27 Court must be dismissed. Therefore, any request for injunctive and declaratory relief
28 premised upon those counts must likewise fail.

ARTICLE III STANDING

Several defendants argue that Plaintiffs lack standing under Article III of the United States Constitution and, thus, Plaintiffs' claims should be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction. The Court has addressed the deficiencies of Plaintiffs' complaints under Rule 12(b)(6), completely dismisses Plaintiffs' complaints for their failure to state a claim, and will not retrace its steps in a Rule 12(b)(1) analysis.

LEAVE TO AMEND

Plaintiffs do not explicitly seek leave of this Court to file amended complaints. However, Plaintiffs have undertaken to remind the Court that it "should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." (Doc. 488 at 37 (quoting *Doe v. United States*, 58 F.3d 494, 496-97 (9th Cir. 1995) (internal quotations omitted).)) Leave to amend a complaint is within the Court's sound discretion, and in exercising this discretion, the Court must be guided by the command of Rule 15(a), which provides that "leave shall be freely given when justice so requires." *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990) (citing Fed.R.Civ.P. 15(a)). "In exercising its discretion[,] . . . 'a court must be guided by the underlying purpose of Rule 15—to facilitate decision on the merits rather than on the pleadings or technicalities.' . . . Thus, 'Rule 15's policy of favoring amendments to pleadings should be applied with extreme liberality.'" *Eldridge v. Block*, 832 F.2d 1132, 1135 (9th Cir. 1987) (citations omitted). The Court should consider five factors when assessing whether to allow leave to amend: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment, and (5) whether the plaintiff has previously amended the complaint. *Foman*, 371 U.S. at 182.

The Court finds that Plaintiffs' indirect requests to amend their complaints do not constitute bad faith, have not resulted from undue delay, and would not result in undue prejudice to the opposing parties. Because Plaintiffs have not formally moved for leave to amend, they have deprived the Court of the benefit of the redlined proposed amended complaint that would be helpful in making a determination about the futility of amendment.

1 The Court also notes that in some of these cases, Plaintiffs have already amended their
2 complaints and are seeking leave to do so for a second or third time.

3 Yet the Court finds no reason to depart from Rule 15's liberal amendment policy and
4 will grant all of Defendants' motions to dismiss without prejudice.

5 To facilitate the streamlining of this MDL, the Court directs plaintiffs, if they choose
6 to seek leave to amend, to jointly file a proposed consolidated amended complaint together
7 with the various plaintiffs whose actions are currently joined to this MDL. The Court will
8 conduct an initial round of pretrial motions for the other member cases as provided for in the
9 various practices and procedures orders until such time as it is appropriate to set forth a
10 timetable for filing this consolidated amended complaint.⁶

11 CONCLUSION

12 Accordingly,

13 **IT IS ORDERED** regarding *Vargas* that: Defendant Citimortgage, Inc.'s Motion to
14 Dismiss Plaintiffs' First Amended Complaint (Doc. 262) is granted⁷; Defendant GE Money
15 Bank's Motion to Dismiss Plaintiffs' First Amended Class Action Complaint (Doc. 285) is
16 granted; Defendants National City Bank, National City Mortgage, National City Corporation
17 and PNC Financial Services Group, Inc.'s Motion to Dismiss Count Seven of the First
18 Amended Complaint (Doc. 292) is granted; Defendant MortgageIT, Inc.'s Motion to Dismiss
19 First Amended Complaint (Doc. 299) is granted; Defendant JPMorgan Chase Bank, N.A.'s
20 Motion to Dismiss Plaintiffs' First Amended Complaint [#5 in *Vargas*] (Doc. 309) is granted;

22 ⁶ Should there arise a need for any plaintiff to seek preliminary injunctive relief, that
23 party should file a proposed amended complaint concurrently with the motion for preliminary
24 injunction. Such a proposed amended complaint need not conform with this Court's
instruction that a consolidated amended complaint be filed.

25 In a departure from prior practice, any motions relating to less than all member cases,
26 should be filed in the individual case numbers assigned to each case.

27 ⁷ Unless otherwise noted, the Court dismisses Plaintiffs' complaints, without
28 prejudice, for failure to state a claim. As to all other theories, Defendants' motions to dismiss
are denied without prejudice.

1 Certain Defendants' Motion to Dismiss First Amended Class Action Complaint (Doc. 314)
2 is granted; Defendants MERSCORP, Inc. and Mortgage Electronic Registration Systems,
3 Inc.'s Motion to Dismiss Plaintiffs' First Amended Class Action Complaint (Doc. 324) is
4 granted;

5 **IT IS FURTHER ORDERED** regarding *Lopez* that: Defendant Citimortgage, Inc.'s
6 Motion to Dismiss Plaintiffs' Second Amended Complaint [#59-1] (Doc. 260) is granted;
7 Defendant GE Money Bank's Motion to Dismiss Plaintiffs' Second Amended Class Action
8 Complaint (Doc. 281) is granted; Defendants National City Bank, National City Mortgage,
9 National City Corporation and PNC Financial Services Group, Inc.'s Motion to Dismiss
10 Counts Five and Six of the Second Amended Complaint (Doc. 291) is granted; Defendant
11 T.D. Service Company's Motion to Dismiss Second Amended Complaint Against T.D.
12 Service Company (Doc. 297) is granted; Defendant JPMorgan Chase Bank, N.A.'s Motion
13 to Dismiss Plaintiffs' Second Amended Complaint [#419 in *Lopez*] (Doc. 308) is granted;
14 Certain Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint (Doc. 316)
15 is granted; Defendant National Default Servicing Corp.'s Motion to Dismiss for Failure to
16 State a Claim for Relief (Doc. 318) is granted; Defendants MERSCORP, Inc. and Mortgage
17 Electronic Registration Systems, Inc.'s Motion to Dismiss Plaintiffs' Second Amended Class
18 Action Complaint (Doc. 331) is granted;

19 **IT IS FURTHER ORDERED** regarding *Goodwin* that: Defendant Citimortgage,
20 Inc.'s Motion to Dismiss Plaintiffs' Second Amended Complaint [#45-1] (Doc. 259) is
21 granted; Defendant Deutsche Bank National Trust Company's Motion to Dismiss Plaintiffs'
22 Second Amended Class Action Complaint (Doc. 266) is granted; Defendant Ocwen Loan
23 Servicing, LLC's Motion to Dismiss Second Amended Complaint (Doc. 268) is granted;
24 Defendant Western Progressive Trustee LLC's Motion to Dismiss Second Amended
25 Complaint (Doc. 269) is granted; Defendant American Home Mortgage Servicing, Inc.'s
26 Motion to Dismiss Plaintiffs' Second Amended Class Action Complaint (Doc. 278) is
27 granted; Defendant GE Money Bank's Motion to Dismiss Plaintiffs' Second Amended Class
28 Action Complaint (Doc. 282) is granted; Defendant Litton Loan Servicing LP's Motion to

1 Dismiss Second Amended Class Action Complaint (Doc. 286) is granted; Defendants
2 National City Bank, National City Mortgage, National City Corporation and PNC Financial
3 Services Group, Inc.'s Motion to Dismiss Counts Six and Seven of the Second Amended
4 Complaint (Doc. 290) is granted; Defendant WMC Mortgage Corp.'s Motion to Dismiss
5 Plaintiffs' Second Amended Class Action Complaint (Doc. 296) is granted; Defendant T.D.
6 Service Company's Motion to Dismiss Second Amended Complaint (Doc. 298) is granted;
7 Defendant I.B. Property Holdings, L.L.C.'s Motion to Dismiss Second Amended Complaint
8 (Doc. 300) is granted; Defendants Aztec Foreclosure Corporation and National Default
9 Servicing Corp.'s Motion to Dismiss for Failure to State a Claim for Relief (Doc. 304) is
10 granted; Defendant JPMorgan Chase Bank, N.A.'s Motion to Dismiss Plaintiffs' Second
11 Amended Complaint [#443 in *Goodwin*] (Doc. 305) is granted; Defendant Bank of New
12 York's Motion to Dismiss (Doc. 310) is granted; Certain Defendants' Motion to Dismiss
13 (Doc. 320) is granted; Defendants MERSCORP, Inc. and Mortgage Electronic Registration
14 Systems, Inc.'s Motion to Dismiss Plaintiffs' Second Amended Complaint (Doc. 327) is
15 granted; Defendant MTC Financial, Inc. dba Trustee Corp's Motion to Dismiss Plaintiffs'
16 Second Amended Class Action Complaint for Failure to State a Claim for Relief (Doc. 479)
17 is granted.

18 **IT IS FURTHER ORDERED** regarding *Green* that: Defendants Citimortgage, Inc.
19 and CR Title Services, Inc.'s Motion to Dismiss Plaintiffs' First Amended Complaint [#35]
20 (Doc. 257) is granted; Defendant American Home Mortgage Servicing, Inc.'s Motion to
21 Dismiss Plaintiffs' First Amended Class Action Complaint (Doc. 279) is granted; Defendant
22 GE Money Bank's Motion to Dismiss Plaintiffs' First Amended Class Action Complaint
23 (Doc. 283) is granted; Defendant Litton Loan Servicing LP's Motion to Dismiss First
24 Amended Class Action Complaint (Doc. 287) is granted and Defendant Litton Loan
25 Servicing LP is dismissed with prejudice⁸; Defendants National City Bank, National City
26

27 ⁸ Plaintiffs, in their response, aver that listing Litton in the caption of the *Green* matter
28 was inadvertent. Doc. 451 at 3 n.3.

1 Mortgage, National City Corporation and PNC Financial Services Group, Inc.'s Motion to
2 Dismiss Counts Two, Three and Four of the First Amended Complaint (Doc. 294) is granted;
3 Defendant Bank of New York Mellon's Motion to Dismiss Plaintiffs' First Amended
4 Complaint [#35] (Doc. 302) is granted; Defendant JPMorgan Chase Bank, N.A.'s Motion to
5 Dismiss Plaintiffs' First Amended Complaint [#35] (Doc. 307) is granted; Defendant
6 National Default Servicing Corp.'s Motion to Dismiss for Failure to State a Claim for Relief
7 (Doc. 312) is granted; Defendant NdeX West, LLC's Motion to Dismiss Plaintiffs' First
8 Amended Class Action Complaint (Doc. 317) is granted; Certain Defendants' Motion to
9 Dismiss (Doc. 321) is granted; Defendants MERSCORP, Inc. and Mortgage Electronic
10 Registration Systems, Inc.'s Motion to Dismiss Plaintiffs' First Amended Complaint (Doc.
11 333) is granted.

12 **IT IS FURTHER ORDERED** regarding *Dalton* that: Defendant Citimortgage, Inc.
13 and CR Title Services, Inc.'s Motion to Dismiss Plaintiffs' Complaint (Doc. 258) is granted;
14 Defendant Deutsche Bank National Trust Company's Motion to Dismiss Plaintiffs' Class
15 Action Complaint (Doc. 267) is granted; Defendant American Home Mortgage Servicing,
16 Inc.'s Motion to Dismiss Plaintiffs' Class Action Complaint (Doc. 277) is granted; Defendant
17 GE Money Bank's Motion to Dismiss Plaintiffs' Class Action Complaint (Doc. #284) is
18 granted; Defendant T.D. Service Company's Renewed Motion to Dismiss Class Action
19 Complaint (Doc. 293) is granted and T.D. Service Company's Renewed Motion to Quash
20 Service of Summons and Complaint is denied as moot; Defendants National City Bank,
21 National City Mortgage, National City Corporation and PNC Financial Services Group,
22 Inc.'s Motion to Dismiss Counts Two, Three and Four of the Complaint (Doc. 295) is
23 granted; Defendants Aztec Foreclosure Corporation and National Default Servicing Corp.'s
24 Motion to Dismiss for Failure to State a Claim for Relief (Doc. 301) is granted; JPMorgan
25 Chase Bank, N.A., EMC Mortgage Corporation, and California Reconveyance Company's
26 Motion to Dismiss Plaintiffs' Complaint (Doc. 306) is granted; Defendant MetLife Bank,
27 N.A.'s Motion to Dismiss (Doc. 319) is granted; Defendants MERSCORP, Inc. and
28 Mortgage Electronic Registration Systems, Inc.'s Motion to Dismiss Plaintiffs' Class Action

1 Complaint (Doc. 325) is granted; Certain Defendants' Motion to Dismiss (Doc. 328) is
2 granted; Defendant Cal-Western Reconveyance Corporation's Motion to Dismiss Class
3 Action Complaint (Doc. 423) is granted.

4 **IT IS FURTHER ORDERED** regarding *Robinson* that: Defendant Citimortgage,
5 Inc.'s Motion to Dismiss Plaintiffs' First Amended Complaint (Doc. 261) is granted;
6 Defendant GE Money Bank's Motion to Dismiss Plaintiffs' First Amended Class Action
7 Complaint (Doc. 280) is granted; Defendants National City Bank, National City Mortgage,
8 National City Corporation and PNC Financial Services Group, Inc.'s Motion to Dismiss
9 Count Eight of the First Amended Complaint (Doc. 288) is granted; Defendant JPMorgan
10 Chase Bank, N.A.'s Motion to Dismiss Plaintiffs' First Amended Complaint [#91 in
11 *Robinson*] (Doc. 303) is granted; Certain Defendants' Motion to Dismiss Plaintiffs' First
12 Amended Complaint (Doc. 311) is granted; Defendants MERSCORP, Inc. and Mortgage
13 Electronic Registration Systems, Inc.'s Motion to Dismiss Plaintiffs' First Amended
14 Complaint (Doc. 326) is granted.

15 **IT IS FURTHER ORDERED** that Defendants GMAC Mortgage, LLC, Executive
16 Trustee Services, Inc., and Homecomings Financial, LLC's Motion to Dismiss All Plaintiffs'
17 Claims Retained by the Court in these Six Class Actions (Doc. 276) is granted; Defendants
18 Aurora, Old Republic, and Saxon's Motion to Dismiss Plaintiffs' Complaints (Doc. 289)
19 (concerning *Goodwin*, *Green*, and *Dalton*) is granted; Motion to Dismiss By Shareholder
20 Defendants (Doc. 315) (concerning all six cases) is granted; Motion to Dismiss Plaintiffs'
21 Complaints Filed by Quality Loan Service Corporation (Doc. 343) (concerning *Goodwin*,
22 *Green*, and *Dalton*) is granted.

23 **IT IS FURTHER ORDERED** that Motion of the Federal Housing Finance Agency
24 as Conservator of Fannie Mae and Freddie Mac to Dismiss (Doc. 264) is denied as moot.

25 DATED this 30th day of September, 2010.

26
27
28 
James A. Teilborg
United States District Judge

**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION**

SAMSON MCGINNIS,

Plaintiff,

v.

GMAC MORTGAGE CORPORATION, as
successor in interest to Homecomings
Financial, and MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS,

Defendants.

**MEMORANDUM DECISION AND
ORDER**

Case No. 2:10-cv-00301-TC

Judge Tena Campbell

Samson McGinnis brings six causes of action based on an \$817,500 mortgage he obtained on his residential property, alleging that Mortgage Electronic Registration Systems (MERS) does not have authority to foreclose on a Deed of Trust for his property and that he was not provided with proper disclosures under the Truth in Lending Act (TILA) at the time he closed on the loan. He also seeks to amend his complaint to add several more claims based on the same conduct alleged in the original complaint. Defendants GMAC Mortgage Corporation (GMAC) and MERS move to dismiss Mr. McGinnis' complaint, arguing that Mr. McGinnis has not stated a claim. They also argue that the court should not authorize Mr. McGinnis to file his amended complaint because it would be futile.

The court GRANTS Defendants' motion to dismiss and DENIES Plaintiff's motion to amend his complaint because such amendment would be futile.

BACKGROUND

Mr. McGinnis obtained a loan from Homecomings Financial for \$817,500 secured by a

property in Midway, Utah, on June 21, 2007, which he purchased that same day.¹ The Deed of Trust securing the note reads in relevant part:

Borrower understands and agrees that MERS holds only legal title to the interest granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of the Lender including, but not limited to, releasing and canceling this Security Instrument.

Deed of Trust (attached as Ex. A to Def.'s Req. for Judicial Notice). Just over a year later, on July 18, 2009, James Woodall, the trustee appointed by MERS to conduct the foreclosure, recorded a Notice of Default against the Midway property. Mr. McGinnis does not claim that the foreclosure was improper because of an error on the part of the mortgage company concerning whether he made his payments. Rather, Mr. McGinnis maintains that Defendant MERS did not have authority to appoint a trustee because MERS was not the beneficiary to the Deed of Trust. Mr. McGinnis also contends that shortly after the Notice of Default was filed, he discovered that Defendants had failed to make proper disclosures under TILA, though he does not specify how the disclosures were not proper. On August 5, 2009, Mr. McGinnis provided MERS, Homecoming Financial, GMAC, and Mr. Woodall with a Notice of Rescission based on the alleged disclosure violations.

Based on these events, Mr. McGinnis has brought claims for quiet title, injunctive relief, fraud, and violation of TILA and the Home Mortgage Disclosure Act (HMDA). He also seeks to

¹Although Mr. McGinnis obtained the loan on the Midway property the same day he purchased the property, he maintains in his opposition brief that the loan was a refinance transaction covered by TILA's rescission provision. If Mr. McGinnis' loan was obtained to finance the acquisition of the property, the loan would not be subject to rescission under TILA. See 15 U.S.C. § 1635(a)(1). The parties have not addressed this issue.

amend his complaint to add another fraud claim and claims for negligent misrepresentation, civil conspiracy, violation of the Utah Consumer Sales Practices Act (UCSPA), and fraudulent nondisclosure.

ANALYSIS

Standard of Review

When reviewing a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted, the court must presume the truth of all well-pleaded facts in the complaint, but need not consider conclusory allegations. Tal v. Hogan, 453 F.3d 1244, 1252 (2006), cert. denied, 127 S. Ct. 1334 (2007); Mitchell v. King, 537 F.2d 385, 386 (10th Cir. 1976).

Conclusory allegations are allegations that “do not allege the factual basis” for the claim. Brown v. Zavaras, 63 F.3d 967, 972 (10th Cir. 1995). See also Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991) (“conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based”) (emphasis added). The court is not bound by a complaint’s legal conclusions, deductions and opinions couched as facts. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). And although all reasonable inferences must be drawn in the non-moving party’s favor, Tal, 453 F.3d at 1252, a complaint will only survive a motion to dismiss if it contains “enough facts to state a claim to relief that is plausible on its face.” Twombly, 550 U.S. at 570, quoted in Ridge at Red Hawk, LLC v. Schneider, 493 F.3d 1174, 1177 (10th Cir. 2007). Stating a claim under Rule 8 “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 555).

The court grants Defendants' motion to dismiss Mr. McGinnis' fraud claim because MERS has the authority to foreclose on Mr. McGinnis' note. Further, Mr. McGinnis' TILA damages claim is time-barred, and he has failed to provide the court with the factual basis for his claim that TILA entitles him to rescind his loan. The court also rejects Mr. McGinnis' claim under the Home Mortgage Disclosure Act because the HMDA does not provide for a private cause of action. Finally, the court denies Mr. McGinnis' motion to amend the complaint because such amendment would be futile.

MERS' Authority to Foreclose

Mr. McGinnis bases his fraud claim and part of his claims for quiet title and injunctive relief on his contention that MERS lacked the authority to foreclose. Mr. McGinnis contends that MERS could not appoint Mr. Woodall as trustee because MERS is merely a nominee of the lender and does not possess the note. This argument is not persuasive.

MERS is an electronic registry that tracks the servicing rights and ownership of mortgage loans. Language in many deeds of trust, including the one signed by Mr. McGinnis in this case, gives MERS the right to act in the lender's behalf. The Deed of Trust signed by Mr. McGinnis states, "MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument." Mr. McGinnis contends that notwithstanding this language in the Deed of Trust, MERS does not have standing to appoint a trustee because it does not have ownership of the promissory note associated with the Deed of Trust. But courts have consistently held that this language in a Deed of Trust gives MERS the authority to foreclose in behalf of the lender and that MERS need not possess the note in order to appoint a trustee in behalf of the lender who does hold the note. See,

e.g., Rodeback v. Utah Fin., 1:09-cv-134, 2010 U.S. Dist. LEXIS 69821 * 9-10 (D. Utah July 13, 2010); Burnett v. Mortgage Elec. Registration Sys., Inc., 1:09-cv-69, 2009 U.S. Dist. LEXIS 100409 * 10-11 (D. Utah October 27, 2009); Mortgage Elec. Registration Sys., Inc. v. Azize, 965 So. 2d 151, 153-54 (Fl. Dist. 2d Ct. App. 2007); Mortgage Elec. Reg. Sys., Inc. v. Ventura, No. CV054003168S, 2006 Conn. Super. LEXIS 1154 * 3-4 (Conn. Super. Ct. April 20, 2006). Moreover, Utah law on nonjudicial foreclosure contains no requirement that the beneficiary produce the actual note in order to authorize the trustee to foreclose on the property secured by the note. See Utah Code Ann. § 57-1-21 to -38.

Mr. McGinnis cites Landmark National Bank v. Kesler, 216 P.3d 158 (Kan. 2009), to support his argument that MERS lacks authority to appoint a trustee. But Landmark National Bank does not concern MERS' standing to foreclose, but rather whether MERS was an indispensable party who should have been allowed to intervene in a foreclosure action initiated by another lender. Id. at 161. Further, the Landmark National Bank case fails to recognize the agency relationship between MERS and the lender that is created by the language in the Deed of Trust designating it as beneficiary. See Blau v. Am.'s Serv. Co., No. cv-08-773, 2009 U.S. Dist LEXIS 90632, * 21-22 (D. Ariz. Sept. 29, 2009) (distinguishing Landmark Nat. Bank and holding that MERS had authority to transfer ownership of the Deed of Trust).

The court dismisses Mr. McGinnis' fraud claim and the portions of his claims for quiet title and injunctive relief that rely on the argument that MERS lacks authority to foreclose on the security interest.

Truth in Lending Act

Mr. McGinnis argues that he rescinded his loan under the rescission provision of the

Truth in Lending Act (TILA) on August 5, 2009, because Homecomings Financial did not provide him with the proper disclosures under TILA. Mr. McGinnis claims that Defendants

violated . . . TILA by failing to make proper disclosures of finance charges, interest rates, fees, costs, penalties and other information required to be disclosed under TILA, . . . failed to provide the proper disclosures at the time the loan was offered and signed by Plaintiff, . . . failed to disclose the true interest rate, the true penalties, the full extent of finance charges, fees, costs and penalties under the loan, . . . [and] failed to properly disclose the right of rescission.

(Compl. ¶¶ 39-42.) Defendants counter that any claims for damages are time-barred by TILA's one-year statute of limitations and further that Mr. McGinnis did not properly rescind his loan because he could not tender the loan amount. Mr. McGinnis contends that the statute of limitations on his damages claim does not bar his claims because either he is entitled to rescind his loan or because the court should equitably toll the statute of limitations. He also takes the position that tender is not required to rescind a loan under TILA.

Statute of Limitations on TILA Claims

Any claim for violation of TILA must be brought "within one year from the date of the occurrence of the violation." 15 U.S.C. § 1640(e). In the Tenth Circuit, the statute of limitations for TILA claims runs from the time the consumer credit transaction was consummated. Stevens v. Rock Springs Nat. Bank, 497 F.2d 307, 309 (10th Cir. 1974) (holding that the failure to meet TILA disclosure requirements is not a continuing breach). Unless some legal basis exists for tolling the statute of limitations in this case, the time for Mr. McGinnis to file claims under TILA ran on June 21, 2008.

Mr. McGinnis argues that the statute of limitations should not run because the lender has been involved in fraudulent, misleading, and deceptive practices that concealed the TILA

violations and, for that reason, the statute of limitations should be tolled. But the complaint alleges only that disclosures were not made, not that Defendants actively concealed the discovery of the information that should have been contained in the disclosures.

Mr. McGinnis also argues that the statute of limitations on his TILA claims should be extended because he has three years to rescind his loan under § 1635. However, the rescission provision of TILA does not extend the one-year statute of limitations on claims for damages for TILA violations. See 15 U.S.C. § 1635; Brown v. Nationscredit Fin. Servs. Corp., 349 F. Supp. 2d 1134, 1137 (N.D. Ill. 2005). Even if Mr. McGinnis is entitled to rescission under TILA, the statute of limitations governing his claims for violation of TILA have run.

Rescission under TILA

Congress enacted TILA in order “to assure a meaningful disclosure of credit terms so that the consumer [could] compare more readily the various credit terms available to him and avoid the uninformed uses of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.” 15 U.S.C. § 1601(a). Section 1635 allows consumers to rescind “any consumer credit transaction . . . in which a security interest . . . is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended,” so long as such rescission takes place within three days of the consummation of the transaction or the delivery of required material disclosures under TILA, whichever occurs later. 15 U.S.C. § 1635. If the lender never submits the required disclosures, the borrower’s right to rescission expires three years after the consummation of the transaction. 15 U.S.C. § 1635(f).

In order for the borrower to have the right to rescind under TILA, the lender must fail to make a material disclosure; mere technical violations warrant damages only. Taylor v. Domestic

Remodeling, Inc., 97 F.3d 96, 99 (5th Cir. 1996) (holding that the failure to disclose the right to rescind was material). A borrower who has not received the required disclosures may rescind the loan transaction by providing notification to the creditor. Id. § 1635(a). The creditor then has twenty days to return the security interest and fees to the borrower. Id. § 1635(b). After the creditor has returned the security interest to the borrower, the borrower must then make tender of the funds given under the agreement. Id. “The goal of rescission is to restore the status quo that existed prior to the parties’ agreement.” Anderson v. Doms, 2003 UT App 241, ¶ 11, 75 P.3d 925 (citations omitted); see also Williams v. Homestake Mortgage Co., 968 F.2d 1137, 1140 (11th Cir. 1992).

TILA details the procedure for a borrower to rescind the loan, but allows the court to modify this procedure to maintain rescission’s status as an equitable remedy. “Congress, through its legislative history, has made it quite clear that the courts, at any time during the rescission process, may impose equitable conditions to insure that the consumer meets his obligations after the creditor has performed his obligations as required by the act.” Williams, 968 F.2d at 1142. “Because of the equitable nature of rescission, there is not one precise formula that applies to all rescission cases.” Anderson, 2003 UT App, ¶ 11. Though several other circuits have required borrowers claiming rescission under TILA demonstrate their ability to return the borrowed funds to the lender, the Tenth Circuit has not yet considered the question. Smith v. Argent Mortg. Co., LLC, 331 Fed. Appx. 549, 557 n.5 (10th Cir. 2009); see, e.g., Yamamoto v. Bank of N.Y., 329 F.3d 1167, 1171-73 (9th Cir. 2003); Williams, 968 F.2d at 1140. Moreover, courts have generally waited until the summary judgment stage to determine whether a borrower has the ability to fulfill the tender requirement. See Am. Mortgage Network, Inc. v. Shelton, 486 F.3d

815, 821 (4th Cir. 2007) (affirming summary judgment where borrower did not have the ability to tender); Yamamoto, 329 F.3d 1167; Moore v. Wells Fargo Bank, 597 F. Supp. 2d 612, 616-17 (E.D. Va. 2009) (denying motion to dismiss even though plaintiff had not established her ability to tender); but see Sipe v. Countrywide Bank, 690 F. Supp. 2d 1141, 1150 (E.D. Cal. 2010) (requiring plaintiff to allege ability to tender in the complaint in order to survive a motion to dismiss).

Defendants argue that Grealish v. American Brokers Conduit, No. 2:08-cv-765, 2009 U.S. Dist. LEXIS 84842, 2009 WL 2992570 (D. Utah Sept. 16, 2009) supports their argument that Mr. McGinnis must plead ability to tender in order to survive on a motion to dismiss. But in Grealish the loan transaction was exempt from TILA, and the court considered only common-law rescission. Id. at * 2; see also Stokes v. Mountain Am. Fed. Credit Union, No. 2:10-cv-27, 2010 U.S. Dist. LEXIS 67775 at * 8-9 (July 8, 2010) (holding that borrower had no right to common-law rescission because he had not alleged the ability to return the loan proceeds). TILA modifies the common-law order of rescission by requiring the lender to return the property before the borrower must return the loaned funds. While the court may equitably require a borrower to prove the ability to tender before allowing the borrower to rescind, such a requirement is not part of § 1635 and not an appropriate consideration on a motion to dismiss.

In this case, Mr. McGinnis claims that he rescinded his loan after discovering that Defendants violated TILA by “fail[ing] to identify and disclose all facts relating to the loan and failing to disclose all finance charges to which the borrower will be obligated . . . [,] fail[ing] to properly disclose how finance charges were computed . . . [,] [and] present[ing] the terms of the loan in a document which was not clear and concise and in a manner the borrower could

comprehend.” Complaint ¶ 17. Mr. McGinnis also alleges in his time-barred TILA cause of action that Defendants’ disclosures were “improper,” though he does not specify how these disclosures were improper. Although Mr. McGinnis may have a claim for rescission, the court cannot determine based on his pleading how Defendants failed to provide him the material disclosures required by TILA. Mr. McGinnis has not provided the court or Defendants with a “statement of the claim showing that the pleader is entitled to relief” as required by Rule 8 of the Federal Rules of Civil Procedure because he has failed to state the factual basis for his claim.

Accordingly, the court grants Defendants’ motion to dismiss Mr. McGinnis’ TILA claims. Mr. McGinnis may file a motion to amend his complaint, including a proposed amended complaint on his rescission claim only so long as his amended complaint is filed by September 17, 2010, and complies with Rule 11 of the Federal Rules of Civil Procedure. Defendants may, of course, oppose the motion.

Home Mortgage Disclosure Act

Mr. McGinnis alleges that Defendants have failed to maintain proper records of the loan documentation as required by the Home Mortgage Disclosure Act, 12 U.S.C. § 2803(a) (HMDA). Defendants argue that the HMDA does not provide for private enforcement. Federal regulations state that HMDA is to be enforced by administrative agencies. 12 C.F.R. § 203.6; 12 U.S.C. § 2804. HMDA does not create a private cause of action. See Stokes v. Mt. Am. Fed. Credit Union, 2:10-cv-27, 2010 U.S. Dist. LEXIS 67775, * 9 (July 8, 2010); Routen v. Citi, 2009 U.S. Dist. LEXIS 96575, * 19 (N.D. Ill. Oct. 16, 2009). Accordingly, the court dismisses Mr. McGinnis’s HMDA claim.

First Amended Complaint

Mr. McGinnis seeks to amend his complaint to add several causes of action. First, Mr. McGinnis seeks to bring a claim that Defendants violated the Utah Consumer Sales Practices Act (UCSPA). Specifically, he claims that Defendants failed to obtain financial documentation verifying Mr. McGinnis's ability to repay the loan, loaned him money they knew he could not afford to repay, and failed to disclose all facts and finance charges relating to the loan and how those charges were computed. Mr. McGinnis also argues that Defendants violated the UCSPA because they never possessed the original loan documents. Defendants argue that such an amendment would be futile because the UCSPA does not apply to this mortgage transaction. "The UCSPA, Utah Code Ann. §§ 13-11-1 to -23, prohibits deceptive or unconscionable acts and practices by a supplier in connection with a consumer transaction." Wade v. Jobe, 818 P.2d 1006, 1013-14 (Utah 1991). But if a more specific law regulates the consumer transaction at issue, the UCSPA does not apply to that transaction. Carlie v. Morgan, 922 P.2d 1, 6 (Utah 1996). For instance, the Utah Supreme Court has declined to extend the UCSPA to residential lease transactions for conduct covered under the Utah Fit Premises Act. Id. In this case, Defendants argue that their conduct is governed by the more specific Utah High Cost Home Loan Act, Utah Code section 61-2d-101 to -113, and Mortgage Lending and Servicing Act, Utah Code section 70D-2-101. The court agrees.

Mr. McGinnis also seeks to add a negligent misrepresentation claim, but he does not state any specific misrepresentation upon which he relied. Mr. McGinnis next seeks to add a civil conspiracy claims based on MERS' lack of authority to foreclose, but the court has already rejected this argument. Finally, both the fraud claim based on TILA violations and the fraudulent

nondisclosure concealment claims fail to plead the fraudulent behavior with particularity. Rule 9(b) states: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Plastic Packaging Corp. v. Sun Chem. Corp., 136 F. Supp. 2d 1201, 1203 (D. Kan. 2001). To allege fraud, "the plaintiff must set out the 'who, what, where, and when' of the alleged fraud." Id. Mr. McGinnis' claim does not give the specifics of the alleged fraud sufficient to put Defendants on notice. The court therefore denies Mr. McGinnis' motion to amend the complaint because it would be futile.

CONCLUSION

For the foregoing reasons, the court GRANTS Defendants' motion to dismiss the complaint and DENIES Plaintiff's motion to file a first amended complaint. Consistent with the court's discussion of the TILA claims, Mr. McGinnis may file a motion to amend complaint with the court on the limited issue of rescission under TILA by September 17, 2010.

DATED this 27th day of August, 2010.

BY THE COURT:

A handwritten signature in black ink that reads "Tena Campbell". The signature is written in a cursive, flowing style.

TENA CAMPBELL
Chief Judge

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
NORTHERN DIVISION

JASON J. KING,
Plaintiff,

vs.

AMERICAN MORTGAGE NETWORK, et
al.,
Defendants.

MEMORANDUM DECISION AND
ORDER GRANTING MOTION TO
DISMISS BY DEFENDANT CHASE
HOME FINANCE AND DENYING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

Case No. 1:09-CV-125 TS

This matter is before the Court on a Motion to Dismiss by Defendant Chase Home Finance, which is joined by Defendant Federal National Mortgage Association ("Fannie Mae"), and Plaintiff's Motion for Summary Judgment. For the reasons discussed below, the Court will grant Defendant Chase's Motion and deny Plaintiff's Motion.

I. STANDARD OF REVIEW

As stated, Defendant Chase has filed a Motion to Dismiss. In that Motion, Defendant refers to and attaches a number of documents outside the pleadings. In response, Plaintiff has

filed a Motion for Summary Judgment, also referring to matters outside the pleadings. The Court will treat the Motions as cross motions for summary judgment.

“Notice to the parties is required to prevent unfair surprise when a judge converts a 12(b)(6) motion into a Rule 56 motion.”¹ But “when a party submits material beyond the pleadings in support of or opposing a motion to dismiss, the prior action on the part of the part[y] puts [him] on notice that the judge may treat the motion as a Rule 56 motion.”² “The required notice may be actual or constructive, and in some circumstances, the Tenth Circuit has concluded that the submission of evidentiary materials by the movant, the nonmovant, or both of them constitutes sufficient notice.”³ “A represented party who submits matters outside the pleadings to the judge and invites consideration of them has notice that the judge may use them to decide a motion originally noted as a motion to dismiss, requiring its transformation to a motion for summary judgment.”⁴ Because both parties have submitted material beyond the pleadings in their motions here, and because the issues have been sufficiently briefed by both parties, it should not be unfair or inequitable to treat the 12(b)(6) motion as one for summary judgment.

¹*Arnold v. Air Midwest, Inc.*, 100 F.3d 857, 859 n.2 (10th Cir. 1996) (citing *Nichols v. United States*, 796 F.2d 361, 364 (10th Cir.1986)).

²*Id.* (citing *Wheeler v. Main Hurdman*, 825 F.2d 257, 260 (10th Cir.), *cert. denied*, 484 U.S. 986 (1987)).

³*David v. City and County of Denver*, 101 F.3d 1344, 1352 (10th Cir. 1996).

⁴*Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1533 (9th Cir. 1985).

Summary judgment is proper if the moving party can demonstrate that there is no genuine issue of material fact and it is entitled to judgment as a matter of law.⁵ In considering whether genuine issues of material fact exist, the Court determines whether a reasonable jury could return a verdict for the nonmoving party in the face of all the evidence presented.⁶ The Court is required to construe all facts and reasonable inferences in the light most favorable to the nonmoving party.⁷

II. BACKGROUND

In November 2007, Plaintiff received a loan for \$112,000 from American Mortgage Network, Inc. ("AmNet") to purchase a property in Ogden, Utah. The loan is evidenced by a promissory note (the "Note") signed by Plaintiff on November 8, 2009.⁸ Plaintiff's loan with AmNet was secured by a Deed of Trust dated November 8, 2007.⁹ Mortgage Electronic Registration Systems, Inc. ("MERS") was designated as the beneficiary of the Deed of Trust as nominee for AmNet and its assigns as the legal title owner of the property. The Deed of Trust states, in pertinent part:

Borrower understands and agrees that . . . MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of [Lender's]

⁵See Fed. R. Civ. P. 56(c).

⁶See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Clifton v. Craig*, 924 F.2d 182, 183 (10th Cir. 1991).

⁷See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Wright v. Southwestern Bell Tel. Co.*, 925 F.2d 1288, 1292 (10th Cir. 1991).

⁸Docket No. 19, Ex. A.

⁹*Id.*, Ex. B.

interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and cancelling this Security Instrument.¹⁰

Under the terms of the loan, AmNet was authorized to sell or transfer the Note and Deed of Trust to a third party.¹¹

In February 2008, AmNet sold the loan to Fannie Mae. Defendant Chase is the servicer of the loan for Fannie Mae. On July 7, 2009, MERS assigned its beneficial interest under the Trust Deed to Chase, as evidenced by an Assignment of Trust Deed.¹² Chase named eTitle Insurance Agency as Substitute Trustee under the Trust Deed.

Plaintiff defaulted under the terms of the loan. Chase caused the property to be foreclosed. Chase sold the property to Fannie Mae at the foreclosure sale.¹³

The day before the foreclosure sale, Plaintiff's former counsel wrote a letter on behalf of Plaintiff to Chase.¹⁴ In that letter, counsel demanded a stop of the foreclosure sale, production of the "promissory note and all other documents in your possession related to the loan," and

¹⁰*Id.*, Ex. B, at 3.

¹¹*Id.*, Ex. A at ¶ 1; *id.*, Ex. B at ¶ 20.

¹²*Id.*, Ex. C.

¹³*Id.*, Ex. D.

¹⁴*Id.*, Ex. E.

threatening legal action if the sale was not stopped.¹⁵ Plaintiff has also provided a second letter written by his former counsel on July 21, 2009.¹⁶

III. DISCUSSION

A. QUALIFIED WRITTEN REQUEST

Plaintiff first alleges that Defendant Chase violated the Real Estate Settlement and Procedures Act (“RESPA”)¹⁷ by failing to respond to a qualified written request (“QWR”), namely the letters from Plaintiff’s former counsel. Defendant contends that the letters do not meet the standards of a QWR. Defendant further argues that Plaintiff’s RESPA claim fails because Plaintiff has not demonstrated a causal link between any damages and the alleged RESPA violation.

[A] qualified written request shall be a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that—
(i) includes, or otherwise enables the servicer to identify, the name and account of the borrower; and
(ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.¹⁸

A QWR relates only to the “servicing” of the loan, which is defined as requests relating to the “receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan . . . and making the payments of principal and interest and such other payments with respect

¹⁵*Id.*

¹⁶Docket No. 21, Ex. A.

¹⁷12 U.S.C. § 2605(e).

¹⁸*Id.* § 2605(e)(1)(B).

to the amounts received from the borrower as may be required pursuant to the terms of the loan.”¹⁹ If the lender fails to comply with a QWR, the borrower is entitled to “any actual damages to the borrower as a result of the failure; and . . . any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not to exceed \$1,000.”²⁰

The Court need not determine whether the letters from Plaintiff’s former counsel meet the requirements of a QWR because he has not alleged damages. RESPA requires borrowers to show actual damages as a result of a failure to comply with its provisions and allows the court to provide the borrower with additional damages in the case of a pattern or practice of noncompliance.²¹ Plaintiff has not alleged any actual damage resulting from the failure to respond or delay in responding to the QWR. Therefore, this claim fails.

B. SPLIT NOTE AND TRUST DEED

Plaintiff seeks to have title quieted in him based on the allegation that the Note and Trust Deed have been split. Plaintiff has not met his burden on summary judgment to show that the Note and Trust Deed have been split. Plaintiff has provided no evidence to support this allegation. Therefore, this claim fails.

¹⁹*Id.* § 2605(i)(3).

²⁰*Id.* § 2605(f)(1).

²¹*Id.*; see also *Key v. Fifth Third Bank*, No. 2:06-CV-602 CW, 2009 WL 735048, *11 (D. Utah Mar. 18, 2009).

C. CHASE'S AUTHORITY TO FORECLOSE

Plaintiff also argues that Chase did not have the authority to foreclose the Trust Deed on the Property. As set forth above, the Deed of Trust states:

Borrower understands and agrees that . . . MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of [Lender's] interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and cancelling this Security Instrument.²²

This Court, per Judge Kimball, interpreting an identical provision, has found that MERS had the authority to initiate foreclosure proceedings, appoint a trustee, and to foreclose and sell the property.²³ Here, MERS assigned its beneficial interest under the Trust Deed to Chase, as evidenced by an Assignment of Trust Deed.²⁴ Thus, for the same reasons set out in *Burnett*, Chase had the authority to foreclose the Deed of Trust.

IV. CONCLUSION

It is therefore

ORDERED that the Motion to Dismiss by Defendant Chase Home Finance (Docket No. 18) is GRANTED. It is further

ORDERED that Plaintiff's Motion for Summary Judgment (Docket No. 21) is DENIED.

The Clerk of the Court is directed to close this case forthwith.

²²Docket No. 19, Ex. B, at 3.

²³*Burnett v. Mortgage Electronic Registration Systems, Inc.*, No. 1:09-CV-69 DAK, 2009 WL 3582294, *4 (D. Utah Oct. 27, 2009).

²⁴Docket No. 19, Ex. C.

DATED August 16, 2010.

BY THE COURT:

A handwritten signature in black ink, appearing to read "T. Stewart", is written over a horizontal line.

TED STEWART
United States District Judge

**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
NORTHERN DIVISION**

JEFFERY RODEBACK, and KAP, LLC, as
trustee,

Plaintiff,

v.

UTAH FINANCIAL, BAC HOME LOANS
SERVICING, MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS,
RECONTRUST, and FEDERAL
NATIONAL MORTGAGE ASSOCIATION,

Defendants.

**MEMORANDUM DECISION and
ORDER**

Case No. 1:09-cv-00134-TC

Judge Tena Campbell

Plaintiffs Jeffery Rodeback and KAP, LLC, claim that Defendants BAC Home Loans Servicing, LP (BAC), Mortgage Electronic Registration Systems, Inc. (MERS), Federal National Mortgage Association (FNMA), and ReconTrust have violated various provisions of federal and state law concerning the servicing and foreclosure of a mortgage. Defendants have moved to dismiss the complaint arguing that Plaintiffs have failed to state a claim. The court agrees with Defendants and GRANTS Defendants' motion.

BACKGROUND

Mr. Rodeback obtained a loan for \$306,0000, which he secured with a trust deed on a piece of property. On May 5, 2009, after Mr. Rodeback failed to make payments on the loan, MERS initiated foreclosure proceedings under the trust deed. Mr. Rodeback transferred title to the property to KAP, LLC, on August 28, 2009, but he remained the borrower on the loan. On October 6, 2009, Mr. Rodeback sent several letters to BAC Home Loans, the company servicing his mortgage, including a letter with a number of requests for information about the servicing of

his loan. He initiated this lawsuit on October 14, 2006, claiming that BAC did not respond to his request for information, that MERS did not have authority to foreclose, and that the note and the Trust Deed were split when the note changed ownership.

ANALYSIS

When reviewing a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted, the court must presume the truth of all well-pleaded facts in the complaint, but need not consider conclusory allegations. Tal v. Hogan, 453 F.3d 1244, 1252 (2006), cert. denied, 127 S. Ct. 1334 (2007); Mitchell v. King, 537 F.2d 385, 386 (10th Cir. 1976).

Conclusory allegations are allegations that “do not allege the factual basis” for the claim. Brown v. Zavaras, 63 F.3d 967, 972 (10th Cir. 1995). See also Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991) (“conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based”) (emphasis added). The court is not bound by a complaint’s legal conclusions, deductions and opinions couched as facts. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). And although all reasonable inferences must be drawn in the non-moving party’s favor, Tal, 453 F.3d at 1252, a complaint will only survive a motion to dismiss if it contains “enough facts to state a claim to relief that is plausible on its face.”

Twombly, 550 U.S. at 570, quoted in Ridge at Red Hawk, LLC v. Schneider, 493 F.3d 1174, 1177 (10th Cir. 2007). Stating a claim under Rule 8 “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 555).

Qualified Written Request

Plaintiffs first allege that BAC violated the Real Estate Settlement and Procedures Act (RESPA), 12 U.S.C. § 2605(e), by failing to respond to a qualified written request (QWR). Defendants contend that Plaintiffs did not submit a QWR, but if they did, that Defendants responded to it as required by law. Under § 2605(e)(1)(A), a QWR is a “written request from the borrower (or an agent of the borrower) for information relating to the servicing of such loan” A QWR must also

Include[] a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.

12 U.S.C. § 2605(e)(1)(B)(ii). A QWR relates only to the “servicing” of the loan, which is defined as requests relating to the “receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan . . . and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan.” 12 U.S.C. § 2605(i)(3). “That a QWR must address the servicing of the loan, and not its validity, is borne out by the fact that § 2605(e) expressly imposes a duty upon the loan servicer, and not the owner of the loan.” Consumer Solutions Reo, LLC v. Hillery, 658 F. Supp. 2d 1002, 1014 (N.D. Cal. 2009) (holding that a letter disputing the validity of the loan rather than the servicing was not a QWR); see also MorEquity, Inc. v. Naeem, 118 F. Supp.2d 885, 900-01 (N.D. Ill. 2000) (holding that a letter alleging a forged deed and irregularities in recording did not relate to the servicing of the loan). If the lender fails to comply with a QWR, the borrower is entitled to “any actual damages to the borrower as a result of the failure; and . . . any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not to exceed

\$1,000.” 28 U.S.C. § 2605(f)(1).

In this case, counsel for Mr. Rodeback sent a letter to BAC on October 6, 2009, that Mr. Rodeback contends is a QWR. This letter requested that BAC provide the following:

1. All application, disclosure and closing documents, including the promissory note.
2. History of the monthly principal, interest and escrow payments since inception. For each payment indicate the date received and the date posted.
3. The amount, payment date, purpose, and recipient of all expenses charged or assessed to my mortgage account since inception (other than principal, interest, and escrow fees). For each payment indicate the date received and the date posted.
4. The balance currently owing separately listing any unpaid principal, interest, and escrow charges.
5. The amount, payment date, purpose, and recipient of all escrow account items, including, but not limited to taxes, water and sewer charges, and insurance premiums, charged and/or assessed to my mortgage account.
6. The current balance in the escrow account.
7. The current interest rate on my mortgage account.
8. If you are not the current holder of the note, please provide the name, address, and other contact information of the holder, including a beneficiary statement and indicate your relationship to this entity.
9. The date you started servicing the mortgage account, and if you acquired the servicing rights from another servicer, state the name of the prior servicer und the effective date of the transfer of servicing.

(Ex. C to Mot. Dismiss Am. Compl.)¹ BAC responded to the portions of the letter that relate to the servicing of the loan on January 14, 2010, more than sixty days after the request was made.

Defendants argue that even though their response was late, the QWR was not proper under the statute because it did not identify any servicing error. But the statute does not require such an allegation. Rather, it directs the borrower to provide either the reason the borrower believes the account is in error or to provide enough information that the servicer can respond to

¹Although Plaintiffs did not attach a copy of the letter to the Complaint, where a document is referred to in the complaint and is central to a claim, an indisputably authentic copy of the document may be considered in a motion to dismiss. See GFF Corp. v. Associated Wholesale Grocers, Inc., 130 F.3d 1381, 1384 (10th Cir. 1997).

the QWR. See 28 U.S.C. § 2605(e)(1)(B)(ii).

Defendants also argue that Plaintiffs do not have a claim because they did not allege actual damages. RESPA requires borrowers to show actual damages as a result of a failure to comply with its provisions and allows the court to provide the borrower with additional damages in the case of a pattern or practice of noncompliance. 28 U.S.C. § 2605(f)(1); see also Kee v. Fifth Third Bank, No. 2:06-cv-00602, 2009 U.S. Dist. LEXIS 21502 at *32 (March 18, 2009), Ricotta v. Ocwen Loan Serv., LLC, No. 06-cv-01502, 2008 U.S. Dist. LEXIS 13816 at *16-18 (February 22, 2008) (discussing RESPA's actual damages requirement). In this case, Plaintiffs have not alleged any actual damage resulting from the failure to respond or delay in responding to the QWR.

Plaintiffs do not ask the court for any actual damages for the failure to respond to the QWR, nor do they allege a pattern and practice of noncompliance. Additionally, Plaintiffs filed their lawsuit alleging failure to respond to their QWR only eight days after sending the request letter, long before the statutory time for response from the loan servicer had run. Instead of asking for damages under RESPA, Plaintiffs ask the court to cancel the Trust Deed, end the foreclosure proceeding, and declare that none of the Defendants have any interest in the property at issue in the case. Although Plaintiffs respond to the motion to dismiss by claiming that the foreclosure action, notice of default, current lawsuit, and mental anguish are their actual damages, these damages are not the result of Defendants' delay in responding to the QWR. Rather, they flow from Defendants' actions occurring after Defendants' tardy response.

Split Note and Trust Deed

Plaintiffs argue that the Trust Deed securing the mortgage on the property is invalid

because the underlying note was split from the Trust Deed when the note was assigned separately from the Trust Deed. As a result of this split, Plaintiffs also seek to extinguish the interest of MERS, FNMA, or any other party claiming interest in the property pursuant to the note or trust deed through a quiet title action. Defendants argue that under Utah law, the note cannot be assigned separately from the trust deed. They point to the following statutory language: "The transfer of any debt secured by a trust deed shall operate as a transfer of the security therefor." Utah Code Ann. § 57-1-35. In other words, each successor to the note receives the benefit of the security. Utah Code section 57-1-35 makes it impossible to split the note from the security interest. Therefore, the Trust Deed is valid even if the note changed ownership.

MERS' Authority to Foreclose

Plaintiffs contend that MERS does not have authority to foreclose the trust deed. Defendants counter that the Trust Deed specifically authorizes MERS to foreclose. The trust deed specifies that "MERS . . . has the right: to exercise any or all of [the interests granted by the Borrower through the trust deed], including, but not limited to, the right to foreclose and sell the Property; and to take any action required of the Lender, including, but not limited to, releasing and canceling this Security Instrument." (Trust Deed 2-3 (attached as Ex.B to Mot. to Dismiss Am. Compl.)) In Burnett v. Mortgage Electronic Registration Systems, Inc., No. 1:09-cv-00069, 2009 U.S. Dist. LEXIS 100409 at *10-12 (October 27, 2009), the court interpreted an identical provision in a trust deed to mean that MERS had authority under the trust deed to initiate foreclosure proceedings, appoint a trustee, and to foreclose and sell the property. Here, and for the same reasons the court outlined in Burnett, MERS has the authority to foreclose on the Trust Deed.

For the above reasons the court GRANTS the motion to dismiss BAC, MERS, FNMA, and ReconTrust.

DATED this 13th day of July, 2010.

BY THE COURT:

A handwritten signature in black ink that reads "Tena Campbell". The signature is written in a cursive, flowing style.

TENA CAMPBELL
Chief Judge



TERMS AND CONDITIONS

1. MERS, which shall include MERSCORP, Inc. and Mortgage Electronic Registration Systems, Inc., and the Member shall abide by these Terms and Conditions, the Rules and Procedures (collectively, the "Governing Documents"), copies of which will be supplied upon request. The Governing Documents shall be a part of the terms and conditions of every transaction that the Member may make or have with MERS or the MERS® System either directly or through a third party. The Member shall be bound by any amendment to any of the Governing Documents.
2. The Member, at its own expense, shall promptly, or as soon as practicable, cause MERS to appear in the appropriate public records as the mortgagee of record with respect to each mortgage loan that the Member registers on the MERS® System. MERS shall serve as mortgagee of record with respect to all such mortgage loans solely as a nominee, in an administrative capacity, for the beneficial owner or owners thereof from time to time. MERS shall have no rights whatsoever to any payments made on account of such mortgage loans, to any servicing rights related to such mortgage loans, or to any mortgaged properties securing such mortgage loans. MERS agrees not to assert any rights (other than rights specified in the Governing Documents) with respect to such mortgage loans or mortgaged properties. References herein to "mortgage(s)" and "mortgagee of record" shall include deed(s) of trust and beneficiary under a deed of trust and any other form of security instrument under applicable state law.
3. MERS shall at all times comply with the instructions of the holder of mortgage loan promissory notes. In the absence of contrary instructions from the note holder, MERS shall comply with instructions from the Servicer shown on the MERS® System in accordance with the Rules and Procedures of MERS.
4. No rights or obligations of the Member with respect to any data or information supplied to MERS by or on behalf of the Member shall be altered or affected in any manner by the provision of such data or information to MERS (except as otherwise specifically provided in these Terms and Conditions or the Rules of Membership).
5. If the Member uses MERS as Original Mortgagee (MOM) on the security instrument, the loan must be registered on the MERS® System within 10 days of the Note Date.
6. MERS and the Member agree that: (i) the MERS® System is not a vehicle for creating or transferring beneficial interests in mortgage loans, (ii) transfers of servicing interests reflected on the MERS® System are subject to the consent of the beneficial owner of the mortgage loans, and (iii) membership in MERS or use of the MERS® System shall not modify or supersede any agreement between or among the Members having interests in mortgage loans registered on the MERS® System.
7. If the Member has a third-party register loans (the "Registrar") on the MERS® System on behalf of the Member, the Registrar shall not be deemed an agent of MERS. The Registrar shall be solely an agent for the Member, and MERS is only giving consent to the Member to use a Registrar to enter information on the MERS® System on behalf of the Member. The Member agrees that MERS is not liable to the Member for any errors and omissions, negligence, breach of confidentiality, breach of the Rules and Procedures, or willful misconduct of the Registrar, or any employee, director, officer, agent or affiliate of the Registrar in performing its services to the Member.
8. The Member shall promptly pay to MERS the compensation due it for transactions registered on the MERS® System and other services rendered to the Member based on the then current MERS fee schedules, which may change from time to time. The Member shall promptly pay to MERS any interest and penalties on delinquent fee payments at the rate set by MERS from time to time. MERS shall have the authority to impose reasonable penalties and fines on Members for breach of the Governing Documents, and the Member shall promptly pay such fines in accordance with the terms of their imposition.
9. MERS shall indemnify and hold harmless the Member, and any employee, director, officer, agent or affiliate of the Member ("Member Party"), from and against any and all third-party claims, losses, penalties, fines, forfeitures, reasonable attorney fees and related costs, judgments, and any other costs, fees and expenses ("indemnified Payments") that the Member Party may sustain directly from the negligence, errors and omissions, breach of confidentiality, breach of the Terms and Conditions, breach of the Rules and Procedures, or willful misconduct of MERS, or any employee, director, officer, agent or affiliate of MERS ("MERS Indemnified Claim"). Notwithstanding the foregoing, MERS shall not be liable or responsible under the terms of this Paragraph for any losses or claims

resulting from the actions or omissions of any person other than an employee, director, officer (who is also an employee of MERS), agent or affiliate of MERS.

The Member shall indemnify and hold harmless MERS, and any employee, director, officer, agent or affiliate of MERS ("MERS Party"), for any Indemnified Payments which do not result from a MERS Indemnified Claim and which such MERS Party incurs (i) from the negligence, errors and omissions, breach of confidentiality, breach of the Terms and Conditions, Rules and Procedures, or willful misconduct of a Member Party, (ii) with respect to a transaction on the MERS® System initiated by such Member, or (iii) as a result of compliance by MERS with instructions given by the Member, or its designee, as beneficial owner, servicer or secured party shown on the MERS® System ("Member Indemnified Claim").

MERS shall promptly notify the Member if a claim is made by a third party against either MERS or the Member with respect to any mortgage loan registered on the MERS® System in which the Member is shown on the MERS® System as beneficial owner, servicer or secured party in accordance with the Rules and Procedures. The Member shall promptly notify MERS if a claim is made against the Member that may be subject to the indemnification provisions of this Paragraph.

The obligations of MERS and the Member under this Paragraph shall survive the termination of the Member's use of the MERS® System.

10. MERS and the Member shall maintain appropriate insurance coverage that shall include an errors and omissions insurance policy and a fidelity bond. MERS shall not be required to maintain coverage for persons who may be appointed at the request of the Member as certifying officers of MERS. The Member's policies shall protect and insure MERS against losses in connection with the release or satisfaction of a mortgage loan without having obtained payment in full of the indebtedness secured thereby. Upon request, MERS or the Member shall cause to be delivered to the other a certified true copy of such errors and omissions insurance policy and fidelity bond.

In the event of any loss of principal or interest on a mortgage loan or any Indemnified Payments for which reimbursement is received from a fidelity bond or any errors and omissions insurance policy or other insurance policy, the proceeds from any such bond or insurance shall be held in trust for and be promptly paid to the Member who is shown as the servicer on the MERS® System on behalf of the beneficial owner unless otherwise requested by the beneficial owner.

11. Any notice or other communication which is required or permitted to be given or made to MERS pursuant to any provision of the Governing Documents shall be given or made in writing and shall be sent by nationally recognized overnight courier, or facsimile followed by delivery of the original via first class mail, addressed as follows: MERS, Corporate Secretary, 1818 Library Street, Suite 300, Reston, VA 20190.
12. These Terms and Conditions and all transactions effected by the Member with MERS shall be governed by and construed in accordance with the laws of the Commonwealth of Virginia without regard to its choice of law provisions.
13. Neither the Member nor MERS shall institute a proceeding before any tribunal to resolve any controversy or claim arising out of or relating to these Terms and Conditions, Rules and Procedures, or the breach, termination or invalidity thereof (a "Dispute"), before such party has sought to resolve the Dispute through direct negotiation with the other party. If the Dispute is not resolved within thirty (30) days after a written demand for direct negotiation, the parties shall attempt to resolve the Dispute through mediation. If the parties do not promptly agree on a mediator, either party may request the then chief judge of the Circuit Court of Fairfax County, Virginia to appoint a mediator. All mediation proceedings hereunder shall be held in Washington, D.C. If the mediator is unable to facilitate a settlement of the Dispute within a reasonable period of time, as determined by the mediator, the mediator shall issue a written statement to the parties to that effect and the aggrieved party may then seek relief in accordance with the arbitration provisions of this Paragraph. The fees and expenses of the mediator shall be paid by the party initiating the Dispute.

In the event that the Member and MERS are not able to resolve a Dispute in accordance with the mediation provisions of this Paragraph, such Dispute shall be settled by binding arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof; provided, however, that the place of arbitration shall be Washington, DC, and fees and expenses for the arbitration proceedings shall be paid by the party initiating arbitration.

CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2011, I caused to be served a copy of the foregoing DECLARATION OF PILAR C. FRENCH IN SUPPORT OF SUPPLEMENTAL BRIEFING IN SUPPORT OF MOTION TO DISMISS COMPLAINT on the following person(s) in the manner indicated below at the following address(es):

- JOHN O CAMPBELL ocampbell@houser-law.com; chershey@houser-law.com
- JOHN M THOMAS jthomas@rcolegal.com
- JAMES J. STOUT jjstout1@aol.com

- ☒ by **CM/ECF**
- ☐ by **Electronic Mail**
- ☐ by **Facsimile Transmission**
- ☐ by **First Class Mail**
- ☐ by **Hand Delivery**
- ☐ by **Overnight Delivery**

/s/ Pilar C. French

Pilar C. French